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IN THE

Supreme Court of the United States

October Term, 1970

No. ~~1709~~ 70-170

KEITH MILTON RHINEHART,
Petitioner,

v.

B. J. RHAY,
Superintendent, Washington State Penitentiary,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PETITIONER

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PETITIONER

Keith Milton Rhinehart prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled cause on March 11, 1971 and the Order Denying Rehearing and rejecting the suggestion for rehearing *in banc* entered on April 14, 1971.

I.

CITATIONS TO OPINIONS BELOW

The Opinion of the Ninth Circuit Court of Appeals printed in Appendix A hereto, *infra*, pp. A-1-23, is reported in ..... F.2d .....

II.

JURISDICTION

A petition for rehearing and for rehearing *in banc* was timely filed. The rehearing was denied and the suggestion for rehearing *in banc* was rejected on April 14, 1971 by Order printed in Appendix B hereto, *infra*, page A-24. The Stay of Mandate issued on April 23, 1971 is printed in Appendix C hereto, *infra*, page A-25. The jurisdiction of this Court is invoked under Title 28, U.S. Code, §1254 (1), §1257 (3), and Rules 19 and 22.

III.

QUESTIONS PRESENTED

A. Whether the Ninth Circuit Court erred in reversing a District Court determination that petitioner's state court conviction of sodomy should be vacated as being obtained in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States when

(1) the conviction was obtained, in part, by material testimony which records of the State in existence at the time and available to the prosecution showed to be false; and

(2) the only witness against petitioner had made a post-trial retraction of his testimony.

B. Whether the Ninth Circuit Court erred in affirming the District Court decision that petitioner had not established that the conviction and sentence under which petitioner was being detained was imposed in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States when

(1) a different panel of the Ninth Circuit Court had

previously ruled that a District Court evidentiary hearing should be held on the detailed factual allegations in petitioner's *habeas corpus* application to the effect that the State sodomy statute was not being applied equally and was being used by local law enforcement officials as a club against petitioner whom they had singled out for punishment because of petitioner's exercise of constitutionally protected rights of freedom of religion and speech, and

(2) at the subsequent evidentiary hearing, the District Court refused to permit petitioner to introduce evidence on the Equal Protection issue and rejected an offer of proof containing all of the detailed allegations previously found by the Court of Appeals to merit an evidentiary hearing.

C. Whether the Ninth Circuit Court erred when it refused to decide or even consider three significant constitutional issues which were:

(1) raised by petitioner in his initial *habeas corpus* application and decided adversely to petitioner by the District Court, and

(2) thereafter raised by petitioner in his appeal to the Ninth Circuit Court from that decision and not considered or decided because of the Court's reversal of the District Court on two other grounds, and

(3) thereafter raised by petitioner on remand to the District Court (sitting with a different judge) which Court, while vacating petitioner's conviction on other grounds, refused to consider the other constitutional issues raised on the grounds that the issues were not before the Court, and

(4) thereafter raised by petitioner again on cross-appeal

to a different panel of the Ninth Circuit Court which reversed the District Court decision vacating petitioner's conviction, leaving petitioner's conviction standing without ever receiving a federal appellate consideration of or determination of three significant constitutional issues consistently raised by petitioner.

These constitutional issues are as set forth in questions presented as D, E and F.

D. The conviction and sentence pursuant to which Rhinehart was detained was imposed in violation of constitutionally protected zones of privacy in that the Washington State sodomy statute (*RCW 9.79.100*) purports to make criminal private consensual acts between reasonably biologically mature individuals which are not affected with sufficient public interest to be the subject matter of the exercise of the police power of the state.

E. The conviction and sentence pursuant to which Rhinehart was detained were imposed in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States in that the Washington State sodomy statute (RCW 9.79.100) under which Rhinehart was convicted provides insufficient delineation of conduct that is constitutionally permissible from conduct that may constitutionally be prohibited.

F. The conviction and sentence pursuant to which petitioner was detained was imposed in violation of the establishment portion of the Freedom of Religion Clause of the First Amendment to the Constitution of the United States in that the Washington State sodomy statute *(RCW 9.79.100)* represents an unconstitutional attempt by the legislature to advance certain religious beliefs to the exclusion of others.

IV.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved are the First, Fifth and Fourteenth Amendments to the Constitution of the United States. The statute involved is Revised Code of Washington 9.79.100. All are printed in Appendix D hereto, *infra*, pages A-26, 27.

V.

STATEMENT OF THE CASE

A. Procedural Background

Petitioner was charged in the King County Superior Court of the State of Washington, Cause No. 42591, with one Count of sodomy under *RCW 9.79.100* (R. 1). A jury found petitioner guilty. Sentence was imposed on December 6, 1965 for a term of not more than 10 years (Tr. 2). Petitioner moved in Superior Court on October 25, 1965 for arrest of judgment and for a new trial, and on December 31, 1965 to set aside the verdict. Petitioner raised in these motions all of the substantive constitutional issues presented in this Petition for Writ of Certiorari with the exception of the issue relating to the knowing use of false testimony by the prosecution (Question Presented A). The motions were denied (Tr. 13).

Petitioner appealed to the Supreme Court of the State of Washington. While the appeal was pending and on September 26, 1966, James Miller, who was purportedly the other participant in the act of sodomy and the only state witness of the claimed event, gave a statement to petitioner's attorney recanting his trial testimony. In that statement, Miller asserted that he gave his initial state-

ments to the police and his trial testimony because he was afraid if he did not implicate petitioner the police might get Miller into trouble. In that statement to petitioner's attorney, Miller also asserted that he had never been in petitioner's home and the police provided him with information about Rhinehart's home which was included within his statement and trial testimony.

Petitioner then filed with the Supreme Court of the State of Washington a Motion for Leave to File a Motion for New Trial at the Superior Court level to raise the issues relating to police and prosecutorial misconduct. Petitioner also raised in his Brief of Appellant the contention that the prosecutor had engaged in misconduct by representing to the jury claimed facts relating to Miller's juvenile status and the method and manner used in determining whether Miller might be incarcerated in juvenile detention. Petitioner claimed there was no evidence in the trial record on these issues. In his Brief, petitioner also asked the prosecutor, who had access to juvenile and police department records, questions as to the contents of those records and whether the contents of those records were consistent with the prosecutor's argument to the jury. These questions were not answered by the prosecutor.

The Supreme Court of the State of Washington affirmed petitioner's conviction on March 2, 1967 (Tr. 2). The Opinion is found in *State v. Rhinehart*, 70 Wn.2d 649, 424 P.2d 906 (1967). A Petition for Rehearing *en banc* was denied. Petitioner's Motion for Leave to File a Motion for New Trial at the Superior Court level was also denied by the Supreme Court of the State of Washington (Tr. 13).

Petitioner then submitted to this Court a Petition for Writ of Certiorari which was denied on October 9, 1967 (Tr. 2), 389 U.S. 832 (1967).

Petitioner was incarcerated in the Washington State Penitentiary at Walla Walla, Washington in the custody of B. J. Rhay, Superintendent of Washington State Penitentiary, respondent herein, after the Supreme Court of the State of Washington denied his Petition for Rehearing and while his Petition for Writ of Certiorari was pending before this Court.

On April 10, 1968 petitioner filed his Petition for Writ of Habeas Corpus raising all of the issues here presented in the United States District Court, Eastern District of Washington, Southern Division (Tr. 26). Rhinehart's Petition for Writ of Habeas Corpus was denied by order of the Honorable William N. Goodwin, United States District Judge, by Order dated April 19, 1968 and filed on April 22, 1968 (Tr. 18-21).

Petitioner appealed to the Ninth Circuit Court raising all of the substantive issues here raised. The Ninth Circuit Court in a *per curiam* opinion granted petitioner an evidentiary hearing on two of the issues raised in his petition for writ of *habeas corpus. Rhinehart v. Rhay,* 409 F.2d 208 (1969). The significant portions of that Opinion stated as follows:

> "Appellant claims that his right to equal protection of the laws was violated by virtue of the fact that the Washington sodomy statute under which he was convicted is being discriminatorily enforced in cases of private, consensual incidents between sexually mature adults. In our judgment factual issues are presented by this claim on which no state findings have been made and which require an evidentiary hearing. *Yick Wo v. Hopkins,* 118 U.S. 356, 6 S. Ct. 1064, 30 L.Ed. 220 (1886).
>
> "Appellant also claims that perjured testimony was knowingly used by the state. Upon this claim the state

courts have found against appellant. However, the adequacy of the state findings has been subjected to serious doubt by new evidence contained in the principal witness' latest retraction. Since an evidentiary hearing must, in any event, be held we feel that it should deal with this claim as well."

The evidentiary hearing was held after a change of venue (R. 50) in the United States District Court, Western District of Washington, Northern Division, on November 5, 6 and 7, 1969 before the Honorable William P. Gray, Judge, assigned from the Central District of California (R. 206). Findings of Fact and Conclusions of Law (R. 206-212) and an Order (R. 213, 214) were signed by the Honorable William P. Gray on April 22, 1970 and filed on April 24, 1970.

The District Court after considering the evidence and testimony of the witnesses concluded that petitioner's conviction was obtained in violation of the Due Process Clause of the United States Constitution, in that he was convicted of a crime by a trial in a state court in which the prosecution "knowingly" suppressed material evidence (R. 211).

Respondent Rhay appealed from this determination.

The Order of the District Court also denied petitioner's application for vacation of his sentence and conviction made on the grounds that his conviction was obtained in violation of his rights to the equal protection of the law, (R. 213). This denial was based on a minor amount of witness testimony and after the court heard an extensive offer of proof (R. 389-405, Vol. 3). The District Court also refused to consider the three constitutional issues raised in petitioner's petition for *writ of habeas corpus* which were not ruled upon by the Ninth Circuit Court in *Rhinehart v.*

Rhay, supra. Petitioner cross-appealed from the court's refusal to hear these issues and the court's refusal to hear testimony and vacate his conviction on the equal protection argument.

The Ninth Circuit Court on March 11, 1971 reversed the District Court's vacation of petitioner's conviction on the knowing use of false testimony issue and affirmed the court in all other respects, (Opin. Appendix A, pp. A-1-23). Thereafter the Ninth Circuit Court denied petitioner his petition for rehearing and in doing so modified one sentence in its initial decision which did not affect the outcome of the case (Order Denying Rehearing, Appendix B, p. A-24).

B. Factual Background

This portion of the statement of the case is divided in two parts. The first deals with the due process issue by pointing out certain testimony of witnesses and assertions made by the prosecutor at the time of the petitioner's state criminal trial and contrasting those with what the evidence revealed at the evidentiary hearing held before the District Court on remand from the Ninth Circuit Court of Appeals. The second portion sets forth factual matters and summarizes the offer of proof relevant to the issue of denial of equal protection. Both portions set out below deal with petitioner's three remaining constitutional questions (Questions Presented C, D, E and F).

1. Due Process

Petitioner's conviction was based solely on the testimony of James Miller and Seattle Police Detective William Von Allmen. These were the *only two witnesses* called by the

State in petitioner's criminal trial. As will be pointed out, hereafter, both testified falsely as to material issues in the case. The Deputy Prosecutor who handled the case also made assertions to the jury on material matters which were false and beyond the scope of the evidence presented in petitioner's trial.

The proof of the falsity of the testimony and assertions by the Prosecutor comes directly from written documents in the possession of the Police Department, the files of the Prosecutor, and Juvenile Court records.

The District Court found that all of these records were available to the Deputy Prosecuting Attorney and were not available to the petitioner or his attorney[1] (Finding of Fact VIII, R. 210). This finding was amply supported by the evidence produced at the hearing.

The King Country Deputy Prosecuting Attorney testified that the Prosecutor's office advises and participates in Juvenile Court matters in Juvenile Court (Vol. 3, R. 54). The Prosecutor's office was able to obtain copies of these records for the District Court proceeding itself without any apparent difficulty. *The Deputy Prosecutor who tried peti-*

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1. With respect to Juvenile Court Records, RCW 13.04.091 provides for the secrecy of Juvenile Court proceedings and the exclusion of the public from them and from the records generated by them. The Prosecuting Attorney, however, has access to these records and has the duty to appear for and represent Juvenile Court officers in general court proceedings. *In re Lewis*, 51 Wn.2d 193, 316 P.2d 908 (1957). Police Department records are not available to defendant's counsel without a court order which is not often granted. *State v. Thompson*, 54 Wn.2d 100, 338 P.2d 319 (1959), and *State v. Gilman*, 63 Wn.2d 7, 385 P.2d 369 (1963).

tioner indicated that he might even have had the Juvenile Court records at Rhinehart's trial![2]

The King Country Prosecutor testified that all of the records of the Police Department were available to his office at the time in question and that he had the complete cooperation of the Seattle Police Department in all prosecutions (Vol. 3, R. 252, 253). Officer Von Allmen (the author of many of the Police Department documents which are material to this case) was in attendance assisting the Prosecutor throughout the criminal trial of petitioner.

The documents in the Prosecutor's file were obviously available to the Deputy Prosecutor at the time of petitioner's trial. The Deputy Prosecutor who tried Rhinehart testified as to a particular document, reference to which will be made later.

> ". . . If it was in the file at the time, *which undoubtedly it was,* I probably read it." (Vol. 4, R. 298)
>
> ". . . If this was in the file, I am sure I did read it at some point along the line. The matters contained in there undoubtedly were read by me at the time the case was assigned to me for trial." (Vol. 4, R. 298)

a. Testimony at State Criminal Trial

The testimony at petitioner's state criminal trial of the two prosecution witnesses and of petitioner is set out below.

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2. "THE WITNESS: Now, I go through the Juvenile Court file today, and I see the statement on a report by Mr. Von Allmen about hustling homesexuals.

"THE COURT: Yes?

"THE WITNESS: *I don't know whether or not that was in the prosecutor's file which I had at the time. If it was, I may have read it and I may not have.*" (Vol. 4, R. 294). (Emphasis supplied)

(1) James Miller

James Miller, who was 16 years of age at the time the incident allegedly occurred, testified at the time of trial that he was picked up about 1:30 a.m. on the morning of April 11, 1965 in downtown Seattle by petitioner (Statement of Facts in State Court proceeding, hereinafter designated "St.", pp. 27-39, 48-50). Petitioner then implored and asked a reluctant Miller to go to petitioner's home and earn some money. He, Miller, and petitioner went to petitioner's home where petitioner continued to urge Miller to engage in various homosexual acts. Miller finally agreed to engage in an act of oral sodomy, the act was performed, and petitioner then gave Miller a $10 and a $5 bill. Petitioner then returned Miller to the area where he was picked up where Miller rejoined two companions. Petitioner was the instigator and the one making the proposition and Miller only reluctantly agreed to the proposal (St. 28-31, 32-37).

Miller testified that he and two companions were picked up by the police about noon on the same day—Sunday, April 11—approximately 10 hours after the act of sodomy allegedly occurred. He and his companions were picked up for allegedly prowling a car immediately prior to the arrival of the police officers. At the time he was picked up by the police, Miller was on parole from Fort Warden and had not been home for several days (St. 42-46, 71, 72, 90-93).

Miller testified that he was not involved in the prowling incident for which he was picked up (St. 43).

The clear import of Miller's testimony at the time of trial was that he still had in his possession at the time of his

arrest the $10 bill and the $5 bill that petitioner had allegedly given him for the act of sodomy (St. 36, 37).[3]

Miller told the jury that he went before a judge in Juvenile Court on the day following his arrest, Monday, April 12, 1965, and

"The judge said that we could go home." (St. 89)

The only police officer to whom Miller talked about the alleged act of sodomy was Willim Von Allmen. The first conversation occurred on April 13th, the day after Miller's appearance in Juvenile Court. The first statement implicating Rhinehart in an act of sodomy was given on the same date. He was still at the Juvenile Center even though he was free from further jeopardy and had been told he

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3. Miller's testimony was as follows:
"A. Then I got my clothes on, and he got his on, and then he gave me a $5 bill and a $10 bill and drove me back downtown.
"Q. About what time did you get back downtown?
"A. About—I really don't know.
"Q. What would be your best estimate as to how long you were gone?
"A. About a half hour.
"Q. Did you meet the other two boys downtown?
"A. Yes.
"Q. And is that when the car prowling events took place?
"A. Well, we went out to John's place.
"Q. John?
"A. Yes.
"Q. And how long were you there?
"A. Oh, we went up to his place and he got some money from his father, and we came back into town.
"Q. Did you still have your money with you?
"A. Yes.
"Q. And then what occurred after you got downtown, did you get involved in this thing with the prowling of cars?
"A. Yes." (St. 36, 37)
The District Court concluded that Miller's testimony reasonably indicated that he still had the money allegedly given to him by petitioner in his possession at the time of arrest (Finding of Fact V, R. . . . .). The Opinion of the Ninth Circuit Court engages in a hairsplitting analysis of all of Miller's testimony and concludes, contrary to the District Court, that Miller may not have meant that he had all of his money with him at the time of his arrest (Opinion and Opinion Footnote 16, Appendix A, pp. A-12, 13, 18).

could go home (St. 42-46, 51-55, 88-93). Miller, in the statement given to Officer Von Allmen on April 13th, denied that he had ever engaged in homosexual activities prior to this one occasion (R. 162, first portion of third paragraph). This statement which was introduced into evidence at petitioner's state criminal trial concluded with the words

> "I have *read* the entire statement over with Officer Von Allmen." (R. 163) (Emphasis supplied)

Miller was also examined at trial with respect to a second statement given on May 11, 1965 to petitioner's then trial attorney at the request of one of the women members of petitioner's church. It was learned at that time that Miller *could not read.* A crudely drafted statement was prepared and signed by Miller before another attorney in the office who was a Notary Public. In this statement, Miller denied that any sexual act had occurred. Miller indicated that he was afraid that he would be sent away for car prowling, being away from home overnight, and because of his prior record. As a result of that fear, he gave the police the statement they seemed to wish from him with respect to petitioner. Miller, in the statement, indicated that he had been to petitioner's home, but that no sexual act had occurred. Miller repudiated this statement at trial asserting that one of petitioner's parishoners had induced him to make it by the promise of a reward.

Miller initially failed to appear for Rhinehart's state criminal trial. A new trial date was scheduled. Miller testified at petitioner's trial that he was thereafter picked up and taken to the local juvenile center where another statement was taken from him by Detective Von Allmen. This third statement was consistent with the first one and

repudiated the statement given at the office of petitioner's attorney. Miller said that he was in Cascadia Diagnostic Center for juveniles in Tacoma, Washington. He stated that he had been committed to this institution after a Juvenile Court hearing (St. 27).

(2) Detective William Van Allmen

Detective Von Allmen, the only other witness against petitioner, told the jury of taking the two statements from Miller. He also testified that he had talked to Miller's probation officer, a Mr. Peyton, about Miller (St. 119). Detective Von Allmen then stated as follows:

"Q. But before that time, when he was free on the street, did you have any contact with him?

"A. No, I did not.

"Q. You didn't know where he was?

"A. No

"Q. Or what he did?

"A. No, I did not.

"Q. Did you have any way of knowing if he did anything gainful for a living?

"A. I would not, no.

"Q. Do you know whether there has been any incident of solicitation by him for immoral acts since that time?

"A. I have no knowledge of any" (St. 120).

(3) Petitioner Keith Milton Rhinehart

Petititioner Rhinehart took the stand at the state criminal court proceeding in his own behalf. Petitioner stated that he was the minister of the Aquarian Foundation, a spiritualist church in Seattle, Washington. While driving through downtown Seattle early one morning he noticed

a group of boys including one he thought he recognized as a boy who had been raised in his church (St. 189-192). He stopped the car and honked his horn at the boy. When the boy arrived at the car, petitioner realized Miller was not the son of one of his parishioners and started to leave. Miller, impressed by petitioner's car, begged for a ride in the car and petitioner agreed to give him a ride. Miller then repeatedly propositioned petitioner to engage in homosexual activity. Miller told petitioner that he was "a hustler by trade" and gave petitioner "his price list and so forth and so on." Petitioner told Miller that he was not a homosexual and was not interested in the proposition. Petitioner attempted to discourage Miller from this kind of activity (St. 189-195). Petitioner told Miller that he was the minister of a church and that Miller should get counselling. Petitioner wrote out his phone number on a piece of paper and gave it to Miller urging Miller to contact him to get interested in the church and obtain counselling (St. 191).

Petitioner testified that he did not take Miller to his house—he only gave Miller a ride in his car and then returned him to his two companions.[4]

(4) Arguments to Jury at State Criminal Trial

Petitioner attempted to discredit Miller's testimony by arguing that at the time of trial and at all critical times prior thereto, Miller testified falsely in an effort to protect himself from further jeopardy by law enforcement officials (St. 241, 242, Argument of Trial Counsel).

The State, on the other hand, attempted to buttress

4. Petitioner called a witness at his trial who testified that he, the witness, had been approached by Miller and solicited for a homosexual act. The prosecution attempted to discredit this testimony.

the credibility of Miller when he gave the incriminating statements and at the time of trial by arguing that Miller was not involved in the car prowling incident; that Miller had been cleared of the car prowling incident when he gave his first statement; and that the police officers had no control over Miller—Miller's detention was dependent upon the order of an impartial judge and not the police. Portions of that final argument were as follows:

> "Jim Miller you saw on the stand. He is now in confinement in Cascadia Youth Camp. None of us know what his future holds for him, whether some day he will be released, whether there will be further incarceration. We know that on April 11th he was arrested and taken to Juvenile Detention, that *prior to any allegations of any misconduct by Mr. Rhinehart he went before a Juvenile Court judge, and the Juvenile Court judge at that time determined that he was not guilty of the offense of car prowling for which he was arrested.*
>
> "Jimmy Miller at that time stood a very good chance, and as a matter of fact was going to be discharged from juvenile detention; and that would have been the end of it as far as Jim Miller is concerned. But instead, when asked about this—apparently word got to the police officers from one of the other two boys—Jim Miller told them that he had met Keith Milton Rhinehart, told them that an act of oral sodomy had taken place between the two of them, and as a result of his involvement in that transaction Jim Miller now finds himself in Cascadia.
>
> "Again, all I can say is, what motivation could this possibly be for Jim Miller to get up here on the witness stand and tell you something happened which didn't happen." (St. 230)
>
> . . .
>
> "The police do not determine whether or not a boy goes to an institution. This is done in court. . . . a judge up in Juvenile Court, very much like this judge here, and the judge determines the boy's fate; and no police-

man sitting over across the street in the Police Department is going to tell that judge, any more than he is going to tell this judge, what is going to happen in a particular case, or how a particular boy should be handled.

"They had had the hearing. This boy was found not to be involved, at least to the point that he would be convicted of this car prowling. And this was determined by the judge, and this matter had been resolved at that point. The boy stood in no position to do himself any particular good by implicating Mr. Rhinehart in any of his activities." (St. 247, 248)

The jury found petitioner guilty. Petitioner appealed his conviction to the Supreme Court of the State of Washington.

(5) Miller's Post-Conviction Affidavit

After petitioner's conviction and while his case was on appeal to the State Supreme Court, James Miller voluntarily contacted Mr. Rhinehart's present counsel and discussed the case with him. On September 26, 1966, Miller signed an affidavit after the same had been read to him, a copy of which is located in Appendix E, pp. A-28-31. This affidavit repudiated Miller's trial testimony. In that affidavit Miller indicated that he gave the first statement to the police officers because he was told by them that if he did not cooperate he would get into trouble. He understood this to mean that if he didn't give them something which would permit them to arrest Rhinehart he would continue to be confined in Juvenile Detention and might be returned to a State institution where he had been previously detained. Miller also indicated that when he did not show up for trial, he was picked up by police officers

and sent to Cascadia even though insofar as he knew, he had done nothing wrong on that particular occasion. He also indicated that he testified the way he did at the time of trial because he was in Cascadia and felt that if he did not implicate Rhinehart that he would not be released. He stated that he was released from State detention soon after he testified at the trial. Miller stated that he had never been in Rhinehart's home—the police officers who had files on petitioner had supplied him with the information about Rhinehart's home which had been included in his incriminating statements.

It was against this backdrop that the Ninth Circuit Court in *Rhinehart v. Rhay,* 409 F.2d 208 (1969), held that an evidentiary hearing should be held to deal with Rhinehart's claim that perjured testimony was knowingly used by the State.

b. Testimony Showed to Be False by Evidence Introduced in District Court Evidentiary Hearing

Documentary evidence from police, Juvenile Court, and the prosecutor's files produced at the fact-finding hearing in District Court clearly showed that material portions of the testimony given in Rhinehart's criminal trial was either false or incomplete or both, as follows:

(1) Miller Falsely Testified That He Had With Him at the Time of His Arrest the $15 Allegedly Given to Him by Rhinehart.

The Youth Service Center Property Card filled out at the time of Miller's detention on April 11, 1965 clearly shows that Miller had but $6.06 on his person at the time of his arrest (Ex. 4(b); Vol. 3, R. 128-131).

(2) *Miller Falsely Testified That He Was Not Involved in Car Prowling but Was Merely an Objecting Bystander.*[5]

The Seattle Police Department Offense and Arrest Report dated April 11, 1965 (Ex. 4(c), Vol. 3, R. 128-131) indicates that Miller admitted to the Seattle Police Department that he was actively involved in the efforts to prowl the car and planned to steal the automobile but was unable to enter it. The police records also indicate there were *two car-prowling incidents* that morning and not one as indicated at the time of trial. Miller admitted knowledge that a radio found on one of his companions was stolen on the morning of April 11th. Miller was with his companion when this other car was prowled in West Seattle and the radio taken from that car. See the Seattle Police Department Person Investigated Report dated April 12, 1965 (Ex. 4(d), Vol. 3, R. 128-131).[6]

(3) *Detective Van Allmen Falsely Testified That He Had No Knowledge of Miller's Soliciting Homosexuals After the Arrest of Petitioner.*

The Seattle Police Department Person Investigated Report dated June 16, 1965 prepared by Investigating Officer William R. Von Allmen approximately 30 days before the trail of petitioner herein recites as follows:

> "The subject is known to hustle homos." (Ex. 4(k), Vol. 3, R. 128-131)

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5. Miller's testimony at the criminal trial was:
"Well, me and John were standing on the corner there—well, I can't describe it right now, but we were standing there, and he—John said 'Why don't we prowl a car,' or something like that, 'get a car,' and so I said I didn't want nothing to do with it because I've already been in trouble once before, and I didn't want to get sent up." (St. 46)

6. The Opinion of the Ninth Circuit Court does not even discuss this aspect of Miller's false testimony.

Also see Parole Violation Report of Dan Peyton dated June 14, 1965 which states in part as follows:

> "Officer Von Allmen of the Seattle Police Department feels that Jim has been having more homosexual contact in the last two weeks for monetary reasons. While on the run between June 7th and June 11th, Jim was staying overnight in the Green Parrot Theater. This is a homosexual hangout. It is not believed that Jim is seriously homosexual, but it is felt that he has taken up this method to get spending money." (R. 128)[7]

The Prosecutor's file on Rhinehart used by them at his trial contained a Justice Court disposition sheet dated April 28, 1965 which stated in part as follows:

> "The boy [referring to Miller] does look like he knows the way around and might be experienced in this sort of thing [referring to the sort of thing that he was allegedly involved in with petitioner]. Apparently from what the boy says he has been in Juvenile for this sort of thing before." (Ex. 40, Vol. 4, R. 196)[8]

(4) *Miller and the Deputy Prosecutor Each Made Statements to the Jury Which Were False With Respect to the Timing of Miller's Statements to the Police and the Potential Effect of These Statements Upon Miller's Release From Juvenile Detention.*

Miller's testimony that the only police officer that he talked to about the alleged act of sodomy was Officer Von

7. The Opinion of the Ninth Circuit Court reprinted in Appendix A, at pages A-13, 14, goes to great lengths in an effort to explain the inconsistencies in Officer Von Allmen's testimony as opposed to what the Police Department records prepared by him reveal. The Opinion of the Ninth Circuit Court also adopts a very favorable view of the explanation Officer Von Allmen gave at the District Court for the inconsistencies. Officer Von Allmen's District Court testimony bordered on the ludicrous. Credibility is a matter to be determined by the District Court who observed Officer Von Allmen and heard his testimony. It is quite clear from the record that the District Court frankly did not believe Officer Von Allmen's District Court testimony. This conclusion is implicit in Finding of Fact VII (R. 210). See also the cross-examination of Officer Von Allmen (R. 255-257).

8. The Opinion of the Ninth Circuit Court does not even make mention of this document directly in the Prosecutor's file.

Allmen and that this was on April 13th after the judge had already ruled that he was clear of any car prowling charges and that he could go home was clearly false (St. 51-54, 89). Miller first talked about the alleged act of sodomy to a police officer other than Officer Von Allmen on April 12, 1965 before 9:30 a.m. as is indicated by the Person Investigated Report of the Seattle Police Department dated April 12, 1965 (Ex. 4(d), Vol. 3, R. 120-131).

Miller was not free from the jeopardy of the car-prowling charge on April 13, 1965 when he gave the statement to Officer Von Allmen. The records of the Juvenile Court show that an order was entered on the 12th of April *In re the Welfare of Miller (James)* in Juvenile Court No. 33572. The recital to the order showed that the hearing before the judge was a "preliminary hearing." The decretal portion of the order provided as follows:

> "NOW, THEREFORE, IT IS HEREBY ORDERED that the above-named *child* be and the same *is hereby detained* ° ° ° and the petition continued ° ° °" (Res. Ex. 1, Vol 5, R. 304, 305) (emphasis supplied)

On April 22, 1965 an order was entered in Miller's cause in Juvenile Court which provided in part as follows:

> "The court finds that James Miller was released on 4-15-65 to the active supervision of Mr. Peyton, Juvenile Parole Counselor, therefore court services are no longer required.
>
> "From the foregoing Findings and Conclusions of the Court, the court enters the following:
>
> "ORDER
>
> "IT IS NOW THEREFORE ORDERED, ADJUDGED AND DECREED that the Seattle Police petition of 4-11-65 for attempted auto theft is hereby dismissed *and the Seattle Police petition of* 12-16-64 *for runaway is hereby dismissed.*" (Ex. 4(m), Vol. 3, R. 128-131) (Emphasis supplied)

Petitioner first became aware that Miller was being detained not only for attempted auto theft but on a Seattle Police petition for runaway when respondent herein produced the order quoted above immediately prior to the habeas corpus fact finding hearing.

(5) *Miller Falsely Testified and the Prosecutor Incorrectly and Improperly Argued to the Jury That Miller Was in Juvenile Detention at the Time of Miller's Trial and at Other Material Times as a Result of a Court Hearing.*

As has been pointed out, Miller was in a State Juvenile Institution at the time of trial. Miller testified that he was sent there as a result of a court hearing. The Deputy Prosecutor asserted to the jury that a judge determines whether or not a boy goes to an institution and that this is not determined by the police. The evidence developed at the fact-finding hearing indicated these assertions were also false.

Police Detective Von Allmen was the one on June 10, 1965 who determined Miller was to be picked up, determined and alleged that he was an incorrigible, and determined that he was to be held in the Youth Service Center. See the Seattle Police Department Arrest Report dated June 10, 1965 (Ex. 4(j), Vol. 3, R. 128-131). There is no indication in the record that Miller had done anything improper between the time he was previously in detention[9] and the time that Detective Von Allmen determined that

9. While Rhinehart did not know it at the time of petitioner's criminal trial, Miller was picked up on May 31, 1965 for delinquency, glue sniffing and consumption of alcohol. He was released two days later. See Seattle Police Department Identification Report No. 10129 dated May 31, 1965 (Ex. 4(d), Vol. 3, R. 128-131), and Seattle Police Department Follow-Up Report dated June 2, 1965 (Ex. 4(e), Vol. 3, R. 128-131).

he was incorrigible on June 10, 1965. (The Arrest Report indicates that Miller was picked up at his home.)

Miller was not committed to the State juvenile facility in Cascadia by a court and was not in detention at the time of petitioner's trial as the result of a court hearing. He was commited there by a parole revocation by the Department of Institutions Division of Juvenile Rehabilitation (Parole Revocation, R. 133) acting upon the recommendation of Dan Peyton, a juvenile parole counselor, who in turn was relying on information supplied to him in part by Officer Von Allmen (Parole Violation Report, R. 128-131).

In final argument, the Prosecutor told the jury that Miller was, at the time he gave his trial testimony, confined in Cascadia Youth Camp. The Prosecutor represented to the jury that Miller's fate—whether he would be institutionalized or not—is determined by a judge "and no policeman sitting over across the street in the Police Department is going to tell that judge, any more than he is going to tell this judge, what is going to happen in a particular case, or how a particular boy should be handled." The implication here was that Miller would not lie to assist the police or Prosecutor as he had nothing to gain by lying because an impartial court determined his custodial status. This, of course, we now know was simply not true.[10]

The District Court orally announced its decision vacat-

10. The Opinion of the Ninth Circuit Court concerns itself solely with Miller's status at the time of his orginal statement to the police (Opinion, Appendix A, page A-12). The Opinion completely neglects and ignores the critical issue of Miller's custodial status when Miller made the statement implicating petitioner on June 11, 1965. The Opinion also completely neglects the similarly critical issue of Miller's custodial status at the time of Miller's testimony against Rhinehart at Rhinehart's criminal trial. The Opinion does not even consider the inaccurate and misleading argument of the Prosecutor.

ing petitioner's conviction at the conclusion of the evidentiary hearing on November 7, 1969.

(6) *Respondent's Untimely and Questionable Offer of Proof After District Court Evidentiary Hearing.*

Approximately three months after the oral decisions of the District Court, respondent Rhay moved to present additional testimony. This motion was supported by an affidavit of Daniel Peyton. On March 6, 1970, respondent Rhay made an offer to prove the contents of the affidavit. The District Court denied the motion to re-open and rejected the offer of proof.

The Opinion of the Ninth Circuit Court disposes of petitioner's contention that false testimony was introduced as to Miller's custodial status when the first statement was given by concluding that the testimony was in fact not false. The Opinion of the court indicates the following to be the circumstances at the time Miller's first statement was given:

> "The next morning he appeared before a Juvenile Court judge who determined that the evidence against him was insufficient and dropped the charges relating to the car prowling. Miller was not, however, released at that time because the juvenile authorities indicated to the court that Miller's mother was unable to control him and that he should remain at the Youth Center until proper home placement could be arranged. On April 15, Miller was released following arrangements for other living quarters, and a formal order dismissing the charges was signed on April 22." (Opinion, p. 3).

The critical portions of the above paragraph are not supported by the record. As indicated, there was an order entered on April 12 by the court and it provided that Miller was to be detained and the Petition continued (Res. Ex. 1, Vol. 5, R. 304, 305). There was an order

entered on April 22, 1965 which indicates that Miller was released on April 15 to the active supervision of Mr. Peyton, Juvenile Parole Counselor. The rest of the quoted paragraph came from the affidavit of Mr. Dan Peyton submitted to the court on March 6, 1970 some four months after the court concluded the hearing in this case. The affidavit was submitted to support a request by the State to reopen and put on the testimony of Mr. Peyton. This request was denied. As a result of this, *Mr. Peyton was never examined in court, Rhinehart's counsel never had an opportunity to cross examine Mr. Peyton with respect to the items contained in his affidavit, and the District Court never had an opportunity to pass on the credibility of Mr. Peyton's statement.*[11]

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11. The author of the Ninth Circuit Court Opinion has recently stated in another context that affidavits must be viewed significantly different than trial testimony. In so doing, the author of this Opinion stated that affidavits were no substitute for trial testimony.

> "with its opportunity for cross examination and testing the credibility of witnesses which might disclose a picture substantially different from that given by the affidavits." *United States v. Perry*, 431 F.2d 1020, 1022 (CA 9, 1970).

Yet in *Rhinehart's* case, this Court has accepted the untimely affidavit of Mr. Peyton without question.

Petitioner Rhinehart respectfully submits that under any circumstances it is inappropriate for an Appellate Court to accept as a verity matters contained within an affidavit submitted in connection with a motion to reopen. Rhinehart should be given the opportunity to cross-examine the author of the statements without any further showing. However, a further showing can be made. Mr. Peyton's assertion in his affidavit that the Court found that Miller was not implicated in car prowling at the hearing on April 12 is extremely suspect because of other evidence introduced at the District Court hearing. The Seattle Police Department, Offense and Arrest Report dated April 11, 1965 (Ex. 4-C, Vol. 3, R. 128-131) clearly shows that Miller admitted the day before his Juvenile Court hearing to the Seattle Police Department that he was in fact, actively involved in efforts to prowl the car and planned to steal the automobile. Miller also admitted to the police that he was involved in a second car-prowling incident, an admission made within an hour of the hearing which purportedly found him not to be involved. See the Seattle Police Department Person Investigation Report dated April 12, 1965 (Ex. 4-D, Vol. 3, R. 128-131). It stretches the mind a bit to believe that a court would find Miller not implicated when Miller had

(7) *Miller's Fifth Statement.*

It should also be noted that Miller was located by respondent approximately ten days before the District Court fact-finding hearing. He was in jail in Oregon. He gave a fifth statement to respondent while in jail in which he reaffirmed his trial testimony. The Ninth Circuit Court Opinion puts great weight on the fifth statement given by the principal witness, Miller, which reimplicated Rhinehart in the alleged crime (Opinion, Appendix A, pp. A-9, 10).

The Circuit Court gave "considerable weight" (Opinion, Appendix A, p. A-10) to this statement because of the fact Miller was in custody in Oregon and because

> "Rhinehart apparently decided not to pursue Miller further since counsel stipulated that Miller's *most recent* statement would be admitted at the evidenti-

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admitted implication on two different occasions to different police officers. This, coupled with the fact that Mr. Peyton's affidavit is inconsistent with the order actually entered, certainly renders the statements in the affidavit subject to suspicion. Indeed, after cross-examination, the District Court could well have refused to believe such statements.

Of course, had Dan Peyton been called as a witness. Petitioner would have also had the opportunity to question Mr. Peyton about his conversation with Officer Van Allmen about Miller's homosexual contacts reflected in Mr. Peyton's Parole Violation Report of June 14, 1965 (R. 128).

The Ninth Circuit Court did not even face the issue raised by petitioner that the motion to reopen was properly denied on the grounds that it was improper to impeach the court record and on the further grounds that no good reason was shown why the evidence was not produced at the time of trial. *Chemical Delinting Company v. Jackson*, 193 F.2d 123 (C.A. 5, 1951); *Jones v. Jones*, 250 F.2d 454 (C.A. 9, 1957). The State, of course, was prior to the hearing thoroughly aware of the existence of Mr. Peyton as a witness and knew about what things he might be able to testify. The Ninth Circuit Court Opinion shows a willingness to allow petitioner to be convicted without the full truth being presented to the jury. However, if omitted material is prejudicial to petitioner, the Opinion of the Court indicates that it may be introduced to petitioner's detriment in an untimely manner and should be accepted as truth even though petitioner was not afforded an opportunity to cross examine the affiant.

> ary hearing before the District Court in lieu of a deposition where both parties might examine him." Opinion, Appendix A, p. A-10) (Emphasis supplied)

The Circuit Court went on to note that the record before the District Court "by stipulation of counsel, was such that further inquiry was unnecessary and that any doubt created by Miller's 1966 statement was dispelled" (Opinion, Appendix A, p. A-10). The court noted that on that basis alone, the record failed to show that perjured testimony had been used in Rhinehart's trial.

The above factor to which the Circuit Court expressly gave great weight in its Opinion simply does not correspond to the record. The *written Stipulation* (ROA 140, 141) expressly provided that the affidavit taken by petitioner's counsel on September 26, 1966 *and* the affidavit taken by the State on October 28, 1969 were *both* to be admitted in lieu of a deposition. The Stipulation provided that the District Court would consider *both* statements as Miller's deposition. In other words, the District Court had before it, in lieu of a deposition, a statement made by Miller *denying* the act and a statement made by Miller *affirming* the act. The other evidence relating to Miller's credibility introduced at the District Court then became extremely critical in determing which of the various statements of Miller were to be believed.

The District Court *did not* find that the fifth statement was true (or that it was false). The District Court only determined that there were enough things in the files of the State (Police, Prosecutor, and Juvenile Court) to cast substantial doubt on those statements of Miller which implicated petitioner (including the fifth statement) and a jury should determine the truth of the matter. Counsel for

petitioner would never have stipulated that the last affidavit of Miller could be used in lieu of a deposition when it was diametrically opposed to what petitioner contends is the truth. Had the District Court made a finding as to the fifth statement, the court could very well have found it to be false and the fourth statement to be true. After all, Miller had nothing to gain when he gave the fourth statement, he was advised by counsel to tell the truth no matter who it hurt, and he was questioned hard about the statement.[12]

2. Denial of Equal Protection

Mr. Rhinehart's petition for *writ of habeas corpus* contained factual allegations relating to his claim of a denial of equal protection. The factual allegations were included almost verbatim within the Statement of the Case in Appellant's Brief on his first appeal to the Ninth Circuit Court. Petitioner's offer of proof (R. 390-405) at the *habeas corpus* fact-finding hearing was stronger than and included all of the assertions contained in his *writ of habeas corpus* and in the Statement of the Case in his prior brief which

12. The only times that Miller ever implicated Rhinehart was when Miller was in custody. As is shown by an affidavit filed after the Opinion was rendered by the Ninth Circuit Court, this pattern continued after the District Court decision. After the decision was rendered by the District Court in *Rhinehart's* case, the State of Washington scheduled a date for a re-trial of Mr. Rhinehart. Miller had been released from prison in Oregon. He went to the offices of the former King County Prosecuting Attorney, and was questioned there. Miller claimed that while in the offices of the King County Prosecutor, he refused to implicate Mr. Rhinehart in the crime. (Respondent has filed an affidavit contradicting Miller's version of this meeting.) Thereafter, according to Miller, several persons came into the room and threatened to charge him with the felony of perjury unless he implicated Rhinehart. After this threat, Miller called Rhinehart's attorney for help. Miller was advised that present counsel would not represent Miller due to counsel's representation of Rhinehart. Thereafter, the State abandond its efforts to re-try Rhinehart and took the appeal to the Ninth Circuit Court.

is printed in Appendix F, pp. A-32-37, hereto.[13]

The testimony actually produced at the fact-finding hearing and the offer of proof was even stronger than that reprinted in the Appendix. For example, the Deputy Prosecuting Attorney who tried petitioner who was then Assistant Chief Criminal Deputy, testified as follows:

> "Q. Well, isn't it true, though, . . . that you on more than one occasion and to more than one of Mr. Rhinehart's attorneys indicated that he was running some kind of spiritualistic con game and taking advantage of little old ladies up on Capitol Hill?
>
> "A. I don't think so, but I may have. I would be surprised if I had. But if you say I said it or if somebody will say I said it, I may have, because my recollection is not, you know, that perfect about all of my conversations about Mr. Rhinehart. That was my belief, but I usually wouldn't have expressed a belief like that to others." (Vol. 4, R. 291)

Petitioner also offered to prove through one of petitioner's former attorneys that the Deputy Prosecutor advised Rhinehart's former attorney that "it was about time he was put away because he was running some kind of a con game up on Capitol Hill [the location of petitioner's

13. The Court's attention is invited to the italicized portion of the Statement of the Case on page A-36 of Appendix F. The phrase "under the watchful eye of the Seattle Police Department" would have to be described as literary license. The actual offer of proof was as follows:

> "We will have testimony that at these places there are actual acts of sodomy performed in public while police officers are in attendance, as well as other acts which are definitely leading up to such acts, and that the police do not make any effort to stop this, do not make any effort to obtain leads to follow up on to try and catch people who are supposedly violating a statute, a crime so heinous that it requires you to spend 10 years in jail.
>
> "We will show that the dancing there is accompanied by French kissing, genital fondling, obvious types of conduct designed to provoke homosexual stimulation, and that anybody with the least modicum of intelligence would realize that if they really wanted to enforce the sodomy statute . . . on any given night in the city of Seattle, they could have 300 darned good leads, to put it mildly. (R. 391)

church]" (Vol. 5, R. 392) and "that we're really going to get him put away this time for good" (Vol. 5, R. 402).

Mr. William Kinzel was Chief Criminal Deputy at the time of Rhinehart's arrest and conviction (Vol. 3, R. 108). He testified in the court below that he had no independent recollection of anything relating to Mr. Rhinehart other that that which he could get from looking at the file (Vol. 3, R. 108, 109). He also testified that he was unaware that Rhinehart was a minister of a church until it was brought out at the District Court evidentiary hearing; that in 1965 he didn't remember having an opinion that Mr. Rhinehart was involved in some kind of bunco operation with his religion nor did he have any recollection of holding a belief that petitioner's religion was quackery (Vol. 3, R. 114, 115). He then went on to testify that he knew Landon Estep and attended a discussion group at which Mr. Estep was in attendance in October, 1968 (Vol. 3, R. 116, 117). The discussion group meeting was to have nothing to do with petitioner's case. There was nothing in the invitation to the discussion group that would have caused him to examine the prosecutor's file prior to the time of going to the discussion group and he did not do so (Vol. 3, R. 118, 119). The subject of Mr. Rhinehart did come up at the meeting and he could have made some remarks about petitioner at the meeting but he did not recall what they were (Vol. 3, R. 118, 119). Petitioner offered to prove that someone in the discussion group happened to mention Mr. Rhinehart's name and Kinzel immediately launched out with remarks that Rhinehart was a quack, a phony, a medium and other remarks derrogatory to Rhinehart and unrelated to the crime for which he was convicted (Vol. 5, R. 393).

The testimony of Charles O. Carroll, King County Prosecuting Attorney at the time petitioner was arrested and convicted, also indicated a somewhat unusual refusal to cooperate with petitioner's counsel. Carroll also testified that Kinzel as the Chief Criminal Deputy and Dixon as one of the Assistant Chief Criminal Deputies were the only persons in his office with authority to approve the filing of cases and to dismiss or reduce cases once filed (Vol. 3, R. 44).

Petitoner offered to prove through Dr. Wardell Pomeroy, the co-author of both Kinsey reports on male and female sexual behaviors and the co-author of the book *Sex Offenders,* that there are probably anywhere from 100,000 to one million acts of sodomy committed in King County alone in any given 6-month period and that from 80 to 90 percent of all persons in the county have been guilty of the conduct defined as sodomy in the criminal code. Testimony was produced at the hearing to show that there were no more than 105 arrests for sodomy in the 4-year period immediately preceding Rhinehart's arrest (Vol. 3, R. 148-156). Petitioner's offer of proof also included:

> "Now, thus we know from looking at 105 arrest that no one in King County in this 4-year period—no one was arrested for a homosexual act committed in privacy between persons of reasonable biological maturity—and by this I mean 16 years of age or older—without the use of force or improper duress, unless the police or prosecuting attorney had a desire to arrest that person for reasons other than the violation of the sodomy statute. We are prepared to prove that by these 105 files. (Vol. 5, R. 396)
>
> "...
>
> "Now, in addition, Your Honor, these arrest cases reveal something besides classification that is very im-

portant in determining how the statute is enforced in King County. They show a pattern of—while there may be a filing for sodomy, a pattern of reduction which is almost automatic, which, in Mr. Rhinehart's case, if what they contended had been done by Mr. Rhinehart had in fact been done, he falls right into the category of those, if they are ever arrested, but are automatically reduced, given a slap on the wrist and told to go home.

"Everything about the handling, the disposition, the recommendation of this case is not consistent with any other one of these 105 cases. (Vol. 5, R. 402)

"...

"We have arrest cases here where the prosecutor has recommended a suspended sentence where somebody has engaged in acts with their own children, and we don't know of a single case in the 4-year period where the prosecutor has ever recommended a sentence of 4 years [the recommendation in Rhinehart's case] for somebody arrested and convicted of sodomy unless there was force or violence involved, and you have a hard time finding even a 4-year recommendation where the defendant who is accused of sodomy, had commited an act of sodomy on even 5-year-old children." (Vol. 5, R. 396, 397)

Petitioner also offered to prove through Dr. Pomeroy, the author of the only definitive empirical study made on persons accused of sex crimes, the following:

"It is a definitive empirical study, and the kind of evidence he would produce, Your Honor, first of all is their classification. When they went to classify sex criminals, supposedly they divided homosexual crimes into two categories: crimes between adults and crimes against children, and the category that they use for crimes between adults is persons 16 years of age or older, and children those beneath the age of 16 years.

"...

"... The studies that they made indicated that this was a logical dividing line for the following reasons—

> and again expert testimony would be put on to prove this. That by age 16 a male has already developed his own sexual characteristics. . . . At that point in time, he is either already heterosexually inclined or homosexually inclined, and experience he might have from 16 years or older is not going to significantly affect his own sexual orientation. That's No. 1.
>
> "No. 2, he is sexually mature from a physcial standpoint, and No. 3, as a psychiatrist will testify, he is capable of making an informed judgment about what is deviational sexual behavior and what is not." (Vol. 5, R. 398, 399)

Petitioner also offered to prove that petitioner's church was frequently patrolled and harassed by members of the Police Department and that Rhinehart's own home was frequently entered by members of the Police Department (Vol. 5, R. 401).

Petitioner even offered to prove an incident where an act of sodomy allegedly occured between a 14-year-old boy and a young man who has just about completed his teaching training to become a teacher. The boy came from a good home, had no prior juvenile court record, and had never been involved in any kind of act of this kind before The parents took the boy to the Seattle Police Department where they and the boy were interviewed by Officer Von Allmen who took the boy to the Prosecuting Attorney's office of King County. The parents expressed their concern to the Prosecutor that the young man who was about to become a teacher who had committed this act of sodomy might end up being a teacher in the same school that their boy was attending if he were not charged for this crime. The Prosecutor's office refused to file a sodomy charge against the man who had committed the act of sodomy but instead filed on him as contributing to the delin-

quency of a minor, a misdemeanor. The man got but a slap on the wrist by the Justice Court and was back the next fall at the school where this boy was going to school, teaching him in that school (Vol. 5, R. 403).

VI.

REASONS FOR GRANTING THE WRIT

Question A: Conviction Obtained by Material Testimony Which Records of the State Available to the Prosecution Showed to be False.

1. The decision of the court below in the instant case is directly in conflict with the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States as interpreted in *Napue v. Illinois*, 360 U.S. 264, 3 L.Ed.2d 1217, 79 S. Ct. 1173 (1959), *Miller v. Pate*, 386 U.S. 1, 17 L.Ed.2d 690, 87 S. Ct. 785 (1967), and *Giles v. Maryland*, 386 U.S. 66, 17 L.Ed.2d 737, 87 S. Ct. 793 (1967) and is in conflict with decisions out of the Third, Sixth and Seventh Circuit Courts of Appeal. All of these cases make it clear that due process is denied by the conviction of a crime by a trial in which (a) material (b) perjured (c) testimony is (d) knowingly used by the state. This is true whether the due process denial was labelled to be a material suppression of evidence by the state or knowing use of false testimony by the state.

(a) *Material Testimony.*

Petitioner did not have to establish his innocence of the crime of sodomy in order to obtain a new trial on the grounds stated. All petitioner had to do was show *material* testimony was false.

In *Miller v. Pate*, 342 F.2d 646 (CA 7, 1965), and 386 U.S. 1, 17 L.Ed.2d 690, 87 S. Ct. 785 (1967), peti-

tioner was convicted of rape. *The conviction was based on various evidence including his own confession.* This court granted petitioner a new trial because a pair of shorts introduced in petitioner's trial were discovered to be stained with paint. The testimony at trial was that the shorts were stained with blood with a type identical to that of the victim and no mention was made of the paint on the shorts.

Testimony going to the *credibility of an important witness* is material and, if false, requires the granting of a new trial. Thus, in *Napue v. Illinois,* 360 U.S. 264, 3 L. Ed.2d 1217, 79 S. Ct. 1173 (1959), petitioner was granted a new trial on due process grounds when a prosecution witness falsely testified he had received no promise or consideration in return for his testimony. See also, *Giles v. Maryland,* 386 U.S. 66, 17 L.Ed.2d 737, 87 S. Ct. 793 (1967):

(b) *Perjured Testimony.*

The testimony must be purjured or false. Of course affirming that something is true without knowledge of its truth is perjury. For example, see RCW 9.72.070 which states as follows:

> "Every unqualified statement of that which one does not know to be true is equivalent to a statement of that which he knows to be false."

Testimony may be perjured or false by omission. Thus, in *Miller v. Pate, supra.* the shorts may have had blood stains as testified to by the State's witnesses but the failure to also indicate there was paint on the shorts invalidated the conviction. See also, *Giles v. Maryland, supra,* where the failure to advise the defense of matters in a juvenile

court proceeding involving the prosecution witness in a rape case was held tantamount to false or perjured testimony.

(c) *Testimony.*

As pointed out in "b" *supra*, the "testimony" may consist of an omission to testify or a failure to disclose.

The "testimony" may also consist of unsworn statements by the prosecution not warranted by the evidence which statements prove to be incorrect. *Miller v. Pate, supra,* reversed a conviction and relied heavily on the argument to the jury by the prosecutor heralding the "bloodstained" shorts as evidence of defendant's guilt.

(d) *Knowingly Used by the State.*

It is now clear that due process depends upon the fairness of petitioner's trial and not the state of mind of the prosecutor. Petitioner need not show that the prosecutor who tried his case allowed testimony to be used with subjective knowledge of its falsity, It is enough that someone in the prosecutor's office or the police deparment have knowledge of facts inconsistent with testimony at the trial. See *Giles v. Maryland, supra,* where police knowledge of the prosecuting witness' reputation for chastity and incidents relating thereto satisfied the knowing use requirement without showing of subjective bad faith on the part of an individual prosecutor.

False testimony by a police officer is automatically "knowing use of false testimony" by the State:

> "No clearer averment of knowledge on the part of the state that perjured testimony was being used could be made than the present one, alleging perjury on the part of its agents, the police." *Stronsnider v. War-*

den of Maryland Penitentiary, 228 Maryland 663, 180 A.2d 854, 856 (1962).

To the same effect, see *Curran v. Delaware*, 259 F.2d 707 (CA 3, 1958). In the *Curran* case, a police officer testified at defendant's trial that the defendant give but one statement. The prosecuting attorney had no knowledge to the contrary. It later developed that there were two statements typed. The police officer attempted to explain his answer in the *habeas corpus* hearing (as did Officer Von Allmen attempt to explain his answer in the case at bar) by stating there was only one statement because the statement was the substance of what the men said, not the piece of paper upon which it was written. The Third Circuit Court of Appeals held that the conviction of the defendants had been obtained by the knowing use of false testimony in violation of the defendants' right to due process of law. The fact that the police officer who is an officer of the state has knowledge of the falsity of the testimony is sufficient.

The knowing use requirement is also satisfied by showing that the truth would have been available to the prosecutor by the exercise of reasonable diligence. *U.S. v. Consolidated Laundries Corporation*, 291 F.2d 563 (CA 2, 1961). At least one Circuit has held that a conviction obtained by the use of false testimony, whether or not knowingly used, violates due process requirements. *Jones v. Commonwealth of Kentucky*, 97 F.2d 335 (CA 6, 1938). This Circuit recognizes that one convicted on false testimony is unjustly convicted regardless of the frame of mind of the prosecutor.

The Ninth Circuit Court infers that petitioner should be prejudiced because a pre-trial request of various police

and juvenile court documents was not made by petitioner's defense counsel prior to petitioner's trial in the state criminal proceedings. *Giles v. Maryland, supra,* was also a case in which there was no pre-trial request and this court nonetheless held that a failure to disclose juvenile court proceedings and other evidence in the hands of the police amounted to a denial of due process. Petitioner, as in *Giles,* sought this information after trial and after Miller's post-trial affidavit alerted counsel to the possibility of the suppression of material evidence in State records.

Petitioner will not again set forth here the many instances of false testimony presented in Rhinehart's state criminal trial which have already been outlined in the Statement of the Case. Suffice it to say, any one of the various items listed in that Statement of the Case would have been sufficient to support the District Court's conclusion that due process was denied to Rhinehart and that he was convicted of a crime by a trial in which material perjured testimony was knowingly used by the state.

Question B: Denial of Equal Protection of the Laws

2. The decision of the court below in the instant case is directly in conflict with the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States as interpreted by this court in *McLaughlin v. Florida,* 379 U.S. 184, 13 L.Ed.2d 222, 85 S. Ct. 283 (1964).

If the sodomy statute of the State of Washington *(RCW 9.79.100)* is otherwise constitutional, the police or the prosecutor may exercise discretion in making arrests under it provided that they exercise this discretion in a fair and impartial manner and do not illegally discriminate between

persons in similar circumstances. The illegal discrimination in the petitioner's case is that he was charged with the crime of sodomy because of his exercise of constitutionally guaranteed rights of freedom of religion and freedom of speech.[14]

The testimony produced at the District Court and the offer of proof rejected by the court set forth facts constituting a denial of equal protection. There was direct evidence of a desire by Police Department and Prosecuting Attorney personnel to convict petitioner because they disliked his religion and felt that he was a quack. The evidence and the offer of proof also established that no persons were charged with sodomy in King County when the

14. Petitioner was arrested one week after he appeared on the first of what was to be a long series of hourly television programs featuring interviews with internationally famous persons. The purpose of the program was to discuss moral, philosophical and spiritual problems and acquaint the viewers with the practices and beliefs of the Aquarian Foundation. The program interviews had been filmed by petitioner and television production technicians at the expense of the Aquarian Foundation on a recent trip around the world made for that purpose. The first program consisted for the most part of a film interview between petitioner and Mrs. Aldous Huxley. At the conclusion of the program, an ex-convict, a lesbian, a homosexual, and an unwed mother, and a couple who were parties to an inter-racial marriage, were each given a brief opportunity to voice their views. The program concluded with petitioner's appeal to the viewers to understand all of these people as human beings created by God and afford them the privilege of privacy of action free from the police power of the State as long as their actions did not harm any other members of society. (See documents filed in State Court proceeding after petitioner's conviction (St. 620).

At the time Miller was picked up by the police, the police had files on petitioner which included an advertisement for the TV program shown scarcely one week before; a mug shot of petitioner's only conviction and that a misdemeanor when petitioner was a teenager in Colorado; and other pictures and material taken and gathered over a 10-year period. The Federal District Court refused petitioner's request to require all of this material to be produced at the evidentiary hearing. It has subsequently come to counsel's attention that the Seattle Police Department for some period of time had a paid informant infiltrate the Aquarian Foundation. This information was obtained just this year —1971.

act occurred in private between individuals 16 years of age and older and did not involve force or duress—that is, no persons were so charged with the exception of petitioner and a handful of other individuals whom the police or Prosecuting Attorney had a desire to arrest for reasons other than the violation of the sodomy statute. The remaining approximately 100 arrests involved a situation where one of the participants in the homosexual act was under the age of 16 years, where the act was committed in public, or where the act was accomplished with the use of force and duress.

The Opinion of the Ninth Circuit Court takes the position that as long as the police arrested persons who committed acts of sodomy on persons under the age of 16, or in public, or by the use of force and duress—as long as the police made this kind of arrest, there was no denial of equal protection for the arrest of petitioner (Opinion, Appendix A, pp. A-16, A-17). This must also have been the view of the District Court which refused to permit petitioner to put on evidence on his equal protection contention and denied Rhinehart's offer of proof. However, this was not the view of the Ninth Circuit Court in its first Opinion in Rhinehart's case (*Rhinehart v. Rhay*, 409 F.2d 208 (1969). In that Opinion, a different panel of the court below stated:

> "Appellant claims that his rights to equal protection of the law was violated by virtue of the fact that the Washington sodomy statute under which he was convicted is being discriminatorily enforced *in cases of private consensual incidents between sexually mature adults.* In our judgment factual issues are presented by this claim on which no state findings have been made and which require an evidentiary hearing."

Petitioner has yet to have the evidentiary hearing on the equal protection issue. The most recent decision of a different panel of the Ninth Circuit Court is contrary to the prior decision of the same court and contrary to the decisions of this court.

Question D: Violation of Constitutionally Protected Rights to Privacy

3. The court below refused to consider or decide the significant constitutional question raised by petitioner that his conviction and sentence was imposed in violation of constitutionally protected zones of privacy in that the sodomy statute under which he was convicted purports to make criminal private consensual acts between reasonably biologically mature individuals which are not affected with sufficient public interest to be the subject matter of the exercise of the police power of the state. The refusal to consider and decide this issue has the same effect on petitioner as an adverse decision. Such a decision would have been in conflict with *Griswold v. Connecticut,* 381 U.S. 479, 14 L.Ed.2d 510, 85 S. Ct. 1678 (1965) and the three-judge panel decision in *Buchanan v. Batchelor,* 308 F. Supp. 729 (U.S.D.C. N.D., Tex., Dallas Div. 1970) vacated and remanded for reconsideration on other grounds (Journal of Proceedings of the United States Supreme Court, March 29, 1971, Docket Nos. 289 and 290: 8 Crim Law, 4196).

Griswold v. Connecticut, supra, further clarified the concept that certain zones of individual privacy are created by specific guarantees in the Bill of Rights which

> ". . . have penumbras formed by emination from these guarantees that help give them life and substance." (p. 484)

This court unquestionably held in *Griswold v. Connecticut, supra,* that the state police power does not extend to the marital bed. The right of privacy in a marital relationship is so fundamental and basic that the state may not undertake to regulate by means of the criminal law the details of that intimacy.

Petitioner here makes two contentions. The first is that *RCW 9.79.100* is void on its face. This statute is void on its face because it is so broad that an indictment could be framed and a conviction obtained against one or both of the parties to a marriage who engaged in the prohibited sexual contact. *RCW 9.79.100* states in part as follows:

> "Every person who . . . shall carnally know any male or female person . . . with the mouth or tongue; or who shall voluntarily submit to such carnal knowledge . . . shall be guilty of sodomy . . ."

Griswold makes it clear that this sodomy statute may not constitutionally be applied to married persons who engage in the conduct prohibited by the statute even though the statute is broad enough so that an indictment could be framed and a conviction obtained against married persons.

Kinsey, in his report on *Sexual Behavior in the Human Female,* 1953, indicates that conduct of the type prohibited by the statute here in question is a common part of the sexual relations of married couples. Forty-nine percent of married females had engaged in oral stimulation of the male genitalia (fellatio) and fifty-four percent had their own genitalia stimulated orally (cunnilingus) (Table 100, p. 399). It is also now generally recognized by religions and authorities in the field of marital adjustment that this is one of many proper means of sexual expression. No conceivable public purpose can be served by the prosecu-

tion and punishment of married persons who engage in mouth-genital sexual expression. See *Chesser, Love Without Fear* (How to Achieve Sex Happiness in Marriage) (1949); *Hirsch, Power to Love* (1958) and *Baruch and Miller, Sex in Marriage* (1962).

This court has held that a criminal ordinance or statute is void if it is drawn so broadly that it encompasses the unconstitutional as well as the constitutional without discrimination. *Thornhill v. Alabama,* 310 U.S. 88, 84 L.Ed. 2d 1093, 60 S. Ct. 736 (1939) and *Lovell v. Griffin,* 303 U.S. 444, 82 L.Ed. 949, 58 S. Ct. 666 (1938). In *Lovell,* this court held void an ordinance which forbid the distribution by hand or otherwise of literature of any kind without written permission from the City Manager. In doing so, this court pointed out that the ordinance was not limited to the distribution of obscene literature nor was it limited to the prevention of molestation of inhabitants or misuse or littering of streets and was without limitation as to time or place of distribution. The fact that the ordinance might be applied in such a constitutional manner or interpreted in such a constitutional manner was not material. This court held that the ordinance was void on its face because it encompassed the unconstitutional as well as the constitutional without discrimination.

In the *Buchanan case, supra,* a three-judge court held that the Texas sodomy statute was void on its face as it was broad enough to apply to private consensual acts between married persons. The court entered a judgment permanently enjoining the future enforcement of the sodomy statute as to all persons, not just married persons and declared the statute void on its face for this unconstitutional overbreadth. This court recently vacated that judgment and

remanded to the District Court for reconsideration in light of the court's recent decision defining the circumstances under which a federal court might enjoin enforcement of a state criminal statute.

Petitioner here is not seeking an injuction. Instead, petitioner contends that the statute under which he was convicted is void on its face for unconstitutional overbreadth and his conviction should be reversed.

Petitioner's second contention is that the statute under which he was convicted is void as applied to petitioner. It has already been pointed out that the attempt by the State of Washington to make mouth-genital contact criminal simply is uncontitutional when applied to married persons. There is no rational or empirical reason why this statute should not also be unconstitutional when applied to other consenting individuals with reasonable maturity whose private acts do not interfere with the rights of others in society.

Due process of law demands a reaonable relationship between the act which is made criminal and the furtherance of some legitimate public secular legislative purpose. The state may not constitutionally make an act criminal simply because it is deemed to be ethically improper. One's liberty may not be sacrificed simply because his own personal conduct is deemed immoral by members of society. *Abbington School District v. Schempp,* 374 U.S. 203, 100 L.Ed.2d 844, 83 S. Ct. 1560 (1963) and *Griswold v. Connecticut, supra.*

The legal affect of the constitutional limitations of the police power of the state is the same whether these limitations are classified in terms of constitutionally guaranteed rights to privacy, to due process, to religious freedom, or to

any other of the various specifically guaranteed personal rights in the Constitution. The result is that an individual may not be subjected to the police power of the state unless that act inflicts harm on other members of society. Nor is it enough to find that a particular act *might* harm others in society and therefore make that act criminal. The state may not select means which are unnecessarily broad in protecting members of society. *Griswold v. Connecticut, supra; NAACP v. Alabama,* 377 U.S. 288, 12 L.Ed 2d 325, 84 S. Ct. 1302 (1964).

All persons and groups which have *empirically* studied sexual behavior come to the same basic conclusion about the effect homosexual conduct has on those members of society who do not wish to engage in it. That conclusion is:

> "We may summarize by stating that the law against adult homosexual activity is designed not for the protection of the person or property but for the enforcement of our cultural taboo against homosexuality.
>
> "...
>
> "The homosexual offender versus adults as a group, do not appear particularly criminal or dangerous. They do not damage society, they merely do not fit into it." Gebhard, *Sex Offenders,* page 324, 357.

At least sixty percent of the males in the United States have engaged in the prohibited sexual activity with another male by the age of forty-five years and thirty-seven percent of all males past puberty have had homosexual experiences ending in orgasm (Kinsey, *Sexual Behavior in the Human Male,* pages 610-666). Fully twenty-five percent of the adult males in our population at some time between the ages of sixteen and fifty-five have more than incidental experience with homosexual activity of a type prohibited by the sodomy statute, which experience spans a continuous

period of at least three years (Kinsey, *Sexual Behavior in the Human Male,* page 650). Kinsey also reports that approximately four percent of the adult white males in our population are exclusively homosexual throughout their lives—a group comprising in the United States approximately 3,000,000 males.

Gebhard, *Sex Offenders,* previously referred to, is an empirical study in which the investigators classified various sex offenders by age and type of sex crime. All "adult" males convicted of homosexual crimes with male "adults" were placed within one group. For the purpose of the study, persons sixteen years of age or older were considered to be "adults." The males in this group averaged eight-five homosexual experiences each year outside institutions and, for the most part, would fall within the general classification of persons whose sexual contacts are predominantly homosexual. The group of adult males convicted of homosexual crimes with other adult males was compared to a control group with a composition similar to society at large. The investigators found that the homosexual group ranks slightly above the control group in terms of socio-economic status (Table 9, page 53); that the homosexual's age preference for sexual partners followed that of the control group (p. 639); and that the per capita crime rate of the homosexual group was not significantly different from that of the general population if convictions for crimes involving homosexual conduct were excluded (350, Table 124, page 732). The study found that there was no correlation between the homosexual activity of a person and gambling (p. 374); use of addicting or habit-forming drugs (p. 734-737); or the use of alcohol (p. 740). The homosexual offender is less apt to commit other sexual crimes than the public at large (pp. 354, 825, 835).

The empirical evidence, stripped of moral shibboleths, clearly establishes that those persons who engaged in homosexual activity in private with mutual consent were no more dangerous than any other person in society—their sexual behavior simply did not comply with the dominant ethical standard, but did not in any way interfere with what other persons in society might choose to do sexually or in any other area.

There is simply no rational basis for concluding that one who engages in a single act of consensual sodomy is likely to be the type of person who will inflict harm on others in society. Even if the State's testimony is believed, both parties to the act were willing participants in a private act that could not harm the public in any way.

Petitioner respectfully submits that the Ninth Circuit Court should have considered the issue here raised and should have vacated his State court conviction.

Question E: Statute Void for Vagueness

4. The Ninth Circuit Court should have considered the issue here presented. The refusal to consider and decide this issue has the same effect on Petitioner as an adverse decision. Such a decision would be directly in conflict with the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and the decision of this court in *Wright v. Georgia*, 373 U.S. 284, 40 L.Ed.2d 349, 83 S. Ct. 1240 (1963). In the *Wright* case, *supra*, this court reversed the conviction of six Negroes for breach of the peace committed by playing basketball in a public park in Savannah, Georgia and committed by refusing to obey

the command of a police officer. In so doing, this court stated:

> "This case falls within the rule that a generally worded statute which is construed to punish conduct which cannot constitutionally be punished is unconstitutionally vague to the extent that it fails to give adquate warning of the boundary between the constitutionally permissible and constitutionally impermissible applications of the statute."

It is beyond question that *Griswold v. Connecticut,* 381 U.S. 479, 14 L.Ed.2d 510, 85 S. Ct. 1678 (1965) holds that mouth-genital contact between married persons in private which is made criminal by *RCW 9.79.100* may not be constitutionally punished. The right of privacy applied by this court in the *Griswold* case, *supra,* is not a new concept. See Beaney, *The Constitutional Right to Privacy,* 1962 S. Ct. Rev. 212 and Griswold, *The Right to Be Let Alone,* 55 Northwestern Law Review 216 (1960). At least one court consisting of three federal judges has extended the impact of *Griswold* to the point of declaring a broad sodomy statute unconstitutional in its application to all persons.

How far does this right of privacy extend? Does it extend to private consensual sexual acts by reasonably biologically mature individuals which acts do not threaten the sanctity of a marriage of the preservation of a family? Does it extend to private consensual homosexual acts? It is one thing to answer the question in a judicial context. It is quite another thing to say that the answer a state court or this court will give is so foreordained that a layman reading the statute would have adequate warning as to where the court will draw the boundary between constitutionally permissible and impermissible applications of the statute. Under these circumstances, it cannot be said that the stat-

ute provided petitioner with the adequate notice required by the Due Process Clause in order to impose a criminal penalty on petitioner.

Question F: Statute Violates Establishment Portion of Freedom of Religion Clause

5. The Ninth Circuit Court should have considered and decided this issue consistently raised by petitioner. The refusal to consider and decide the issue has the same effect on petitioner as an adverse decision. Such a decision would be in conflict with the Establishment Clause of the First Amendment and with the Fourteenth Amendment to the Constitution of the United States. It is implicitly in conflict with the decisions of this court in *McGowan v. Maryland,* 366 U.S. 420, 6 L.Ed.2d 393, 81 S. Ct. 1101 (1961) and *Abbington School District v. Schempp,* 374 U.S. 203, 100 L.Ed.2d 844, 83 S. Ct. 1560 (1963).

RCW 9.79.100 flows directly from early Judaeo-Christian ethical laws which were incorporated into statute law in England in the year 1533 during the reign of King Henry VIII. That law provided:

> "Any person who shall commit the abominable and detestable vice of buggery with either mankind or beast, shall be adjudged guilty of a felony, and shall suffer death without the benefit of clergy." *The Law of Crime Against Nature,* 32 N.C. Law Rev. 312 (1953-54).

This court stated in *McGowan v. Maryland, supra:*

> "The First and Fourteenth Amendments afford protection against religious establishment far more extensive than merely to forbid a national or state church . . . The Establishment Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. In many instances, the Congress or state legislatures conclude that the general

> welfare of society, wholly apart from any religious considerations, demands such regulation. . . . And the fact that this agrees with the dictates of the Judaeo-Christian religions while it may disagree with others does not invalidate the regulations."

The test in each case as defined in *Abbington School District v. Schempp, supra,* is as follows:

> "What are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and primary effect that neither advances nor inhibits religion."

It is clear that the statute here involved is based on early views and proscriptions of Judaeo-Christian beliefs. The state has failed to show a proper secular legislative purpose for the statute. While one may agree with the ethical standards involved in *RCW 9.79.100,* it is quite another thing to declare that these ethical standards may form the basis of a punitive criminal statute when all objective inquiry demonstrates that the statute advances no proper secular legislative purpose. Why punish those whose behavior does not meet with your approval unless that behavior adversely affects other members of society?

Questions A through F

6. The question presented is of substantial importance to all persons whose exercise of religious freedom and freedom of speech or any other constitutionally guaranteed right may be disliked by local law enforcement officials. Sodomy statutes comparable to *RCW 9.79.100* are prevalent in all states of the Union except a few. The type of conduct here in question is always consensual and done

in private. Therefore, one accused of such a crime is always victim to the testimony of the alleged other participant in the crime. As in this case, all the police have to do is find someone over whom they have some leverage and control to testify that such an act took place. The defendant then has no way of rebutting this testimony other than by pitting his believability against the believability of the state and its accuser. This is a 50-50 chance at best and a much slighter chance when one takes into consideration the fact that persons who engage in constitutionally protected freedom of speech and religion in such a way as to arouse the ire of the police department are almost always unusual and, therefore, suspect.

7. The question presented is of substantial importance as *RCW 9.79.100* and the sodomy statutes prevalent in Washington and almost every state could be used to imprison over half the adult male population in the United States and could be frequently and repeatedly used against some three million males whose sexual activity is almost exclusively homosexual. These are people who, while one may disapprove or disagree with their sexual behavior, do not harm other in society. They would find as much difficulty in complying with *RCW 9.79.100* as would married heterosexuals have difficulty in complying with a statute which would make sexual intercourse between married persons criminal. Sodomy statutes are not generally enforced anywhere in the United States because local law enforcement officials recognize the absurdity of making criminal private homosexual acts. The homosexual, however, lives under the spectre and fear of intimidation by the police department and the threat of blackmail. The confirmed homosexual is in the anamolous position of engaging in behavior

which law enforcement officials generally ignore (and in the case of Seattle police, supervise) unless and until the threat of prosecution or actual prosecution can be used by the police for purposes entirely independent of the sodomy statute.

The confirmed homosexual lives in a *legal environment* which can only be understood by a heterosexual if he or she would imagine what it would be like to live in a society where heterosexual conduct was made criminal, yet the statute making such conduct criminal was generally not enforced by law enforcement officials. This would be living in a police state of the worst sort. Just do one thing which a law enforcement officer or prosecutor disapproves and be subject to arrest for that which would otherwise go unpunished—the crime of engaging in heterosexual relations.

Petitioner is not here concerned with the *social environment* in which a homosexual must live. There are no constitutional guarantees, and there should be none, that minority conduct must be approved by society. The homosexual is not entitled to *special treatment*. He should, however, be given *equal treatment* and not be denied rights and privileges held by others—the right to be *left alone by the law* unless his conduct in some way impairs a legitimate secular public interest.

8. The decision of the Ninth Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision. The Ninth Circuit Court completely abandoned its appellate role in deciding this case. The law is quite clear that an appellate court must accept the findings of fact of the District Court as long as there is evidence to support those findings even if the appellate court might

have decided the factual issue in a different way. *Irish v. U.S.*, 225 F.2d 3, (CA 9, 1955). The Ninth Circuit Court decided on its own and contrary to the decision of the District Court such matters as the credibility of Officer Von Allmen's testimony at the District Court evidentiary hearing. The Ninth Circuit Court accepted as true every single statement in an affidavit submitted almost three months after the conclusion of the evidentiary hearing (Affidavit of Dan Peyton) even though the affidavit was rejected by the District Court, Peyton was available to testify during the evidentiary hearing and was not called by the State, and there was evidence in the record to indicate the matters in Peyton's affidavit were not true.

The Opinion of the Ninth Circuit Court also leaves petitioner in a position where he has yet to obtain federal appellate consideration and determination of three major constitutional issues (Questions D, E and F). These issues were consistently raised by petitioner and simply ignored by the Opinion of the Ninth Circuit Court.

Perhaps the most unconscionable aspect of this whole case is that petitioner was convicted solely on the testimony of James Miller. Miller's testimony, and Miller's testimony alone, had to supply the proof beyond a reasonable doubt which is required to justify petitioner's conviction. Miller had given five statements at the time of the District Court evidentiary hearing alternately implicating and exculpating petitioner of the crime with which he was charged. The Deputy Prosecutor who tried petitioner was of the opinion that Miller would lie if he had anything to gain. The first District Court judge to consider the habeas

corpus application indicated that Miller was so unreliable and had such a slight regard for truth that he

> "would relate whichever version of the affair appeared to him at that moment most likely to advance his own interests." (ROA 19)

The Opinion of the court below indicates that Miller is so unreliable that it is impossible to speak of abstract truth in attempting to determine the truth or falsity of his statements against and for Rhinehart (Opinion, Appendix A, p. A-17, footnote 6). In short, almost every judicial and non-judicial entity that has examined this case has branded Miller's testimony as unreliable. Yet the opinion below would permit the State of Washington to further deprive petitioner of his liberty based upon a conviction obtained solely through the use of such testimony.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

MALCOLM L. EDWARDS
Counsel for Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KEITH MILTON RHINEHART, *Petitioner-Appellee,* v. B. J. RHAY, Superintendent, Washington State Penitentiary, *Respondent-Appellant.*	No. 26,301
KEITH MILTON RHINEHART, *Petitioner-Appellant,* v. B. J. RHAY, Superintendent, Washington State Penitentiary, *Respondent-Appellee.*	No. 26,098

Appeal from the United States District Court
for the Western District of Washington
Northern Division

Before: KOELSCH, CARTER and WRIGHT, Circuit Judges.

WRIGHT, Circuit Judge:

This case has a prolonged history of consideration by both state and federal trial and appellate courts. At this stage, Rhay appeals from a judgment of the federal district court ordering that the state conviction of Rhinehart be vacated unless the state should re-try him within sixty days.

We reverse because we believe that the ruling of the district court poses a standard of state prosecutorial conduct which is not only unrealistic but also contrary to the

decisions of this court and the Supreme Court of the United States.

I. *THE FACTUAL BACKGROUND*

Because of the peculiar history of the case and our conclusion to reverse, a somewhat lengthy recital of facts is necessary.

Petitioner Rhinehart was convicted in December 1965, on a state charge of sodomy. The state's principal witnesses were James Miller and Seattle Police Officer William R. Von Allmen. Miller was then 16 years old and had had previous difficulties with the state juvenile authorities.

He testified that he and two friends were standing on a street corner in downtown Seattle shortly after 1:00 a.m. on April 11, 1965. A light colored convertible automobile stopped across the street and its driver sounded the horn at them. Miller walked to the car and the driver, Rhinehart, initially indicated that he had mistaken Miller for someone else. He then asked Miller if he would like to earn some money. Receiving an affirmative response, Rhinehart drove them to Rhinehart's apartment where Miller testified that an act of oral sodomy took place. Miller subsequently described in some detail the interior and exterior of Rhinehart's apartment.

Miller testified that Rhinehart gave him $15 in currency and drove him to the business district where Miller rejoined his friends. Rhinehart wrote his phone number on a piece of paper and told Miller to call any time he wanted to earn more money.

Miller testified that he rejoined his friends at 1:30 a.m. and went to the home of one of them to get some more

money. They went back down town and "goofed around all night." When asked for more details, Miller said they had spent most of their time in "a corner restaurant," the name of which he was unable to recall.

Some time later that morning, Miller and his friends were seen by Seattle police officers standing next to a parked car. At that time, approximately 11:00 a.m., they were taken in hand for suspicion of car prowling. Since he was 16 at the time, Miller was taken to the King County Youth Center and detained there over night.[1]

The next morning he appeared before a Juvenile Court judge who determined that the evidence against him was insufficient and dropped the charges relating to the car prowling. Miller was not, however, released at that time because the juvenile authorities indicated to the court that Miller's mother was unable to control him and that he should remain at the Youth Center until proper home placement could be arranged. On April 15, Miller was released following arrangements for other living quarters, and a formal order dismissing the charges was signed on April 22.

On April 13, following dismissal of the charges but while Miller was awaiting release from the Youth Center, he was visited by Officer Von Allmen. The officer inquired about his contact with Rhinehart the night before he was arrested. Miller said he didn't know for sure how Von Allmen heard about it but guessed the other two boys must have told him. Miller gave the facts and signed a statement which Von Allmen first prepared and reviewed with him.

The charge of sodomy was then filed against Rhinehart. Miller was subsequently released from the Youth Center

and prior to trial was visited by a Mrs. Lemmon who was a friend of Rhinehart's and from time to time had attended services at the Aquarian Church where Rhinehart was an ordained minister.

After meeting Mrs. Lemmon, Miler went to the office of Rhinehart's trial counsel and signed a second statement, in which he said, "There was no sexual act of any description between Rev. Rhinehart and myself." He added that the police had influenced him to sign the original statement because "they were really out to get Rhinehart and they needed a statement from me to help them." He added that he had "met Rev. Rhinehart and he had taken me to his home where I had confided my problems to him and he had tried to help me."

Following his contact with Mrs. Lemmon and his new statement but still prior to the trial, Miller signed a third statement which repeated the incident as he had originally reported it to the police. He repudiated the statement given to Rhinehart's attorney and explained that it had been given because he was anxious to leave Seattle and Mrs. Lemmon had promised him a ticket to Alaska if he would copy a statement she had prepared and sign it.

He said he was later told that he would not get the ticket but instead that she would buy him new clothes. He indicated that she had bought him $80 worth of clothing and she testified to the same effect, adding that she had done so for humanitarian reasons and that it had nothing to do with Miller's statement. Miller also said that Mrs. Lemmon had given him money at that time and on one additional occasion, a fact which Mrs. Lemmon also confirmed in her testimony.

Rhinehart testified to his version of the incident with Miller. He said that he had stopped and sounded his horn, thinking that Miller was the son of a member of his congregation. Learning his error, he told Miller but the boy expressed an interest in Rhinehart's car and asked for a ride. Rhinehart agreed.

As they were driving the boy told Rhinehart that he would permit Rhinehart to perform homosexual activity on him for a price. Rhinehart said he declined and told Miller that he was a minister and, though he knew many homosexuals, was not so inclined himself. He denied that Miller had been to his apartment for either sexual or counseling reasons.

The defense version therefore was that Miller was a male prostitute who had made unsuccessful advances at Rhineheart. When Officer Von Allmen testified he was asked if he knew of any incidents of Miller "hustling" homosexuals and he replied that he did not.

To support this theory, the defense called a witness who testified that he had been approached by Miller, some time after the Rhinehart incident, at a homosexual rendezvous where Miller expressed willingness to engage in deviant conduct for a price.

The defense sought to show that Rhinehart had been singled out for prosecution because of his association with the Aquarian Foundation which advocates sexual freedom and because of his recent appearance on a television show with homosexuals and an inter-racial married couple.

In furtherance of this theory, the defense offered to prove the eixstence of other local homosexual gathering places where overt acts of homosexuality took place under

the approving eyes of Seattle police officers. The offer of proof was rejected and is the basis of Rhinehart's cross-appeal, discussed in Section V, *infra*.

Rhinehart's conviction was appealed to the Washington Supreme Court which unanimously affirmed and subsequently denied a petition for rehearing. *State v. Rhinehart*, 70 Wash.2d 649, 424 P.2d 906 (1967). His petition for certiorari was denied by the Supreme Court. *Rhinehart v. Washington*, 389 U.S. 832 (1967).

After his incarceration in the Washington State Penitentiary, Rhinehart filed a petition for writ of habeas corpus in the federal district court. That petition was denied without hearing and his appeal to this court resulted in a remand to the district court directing a hearing on the questions of equal protection and alleged use of perjured testimony. *Rhinehart v. Rhay*, 409 F.2d 208 (9th Cir. 1969).

After the remand, the district court heard detailed testimony on the circumstances of Rhinehart's trial and the several statements of Miller. The court concluded that Rhinehart's claimed denial of equal protection was without merit but ruled that he be retried or released within 60 days because his "conviction was obtained in violation of the due process clause of the United States Constitution in that he was convicted of a crime by a trial in a State court in which material evidence in the possession of the State was withheld from him and therefore was suppressed."[2]

The district court went on to point out that, in its view of the evidence, "[s]uch suppression, although unwitting and unintentional insofar as the prosecutor was concerned, was a 'knowing' suppression in the sense required by the due process clause and the cases decided thereunder, such as *Giles v. Maryland*, 386 U.S. 71, 87 S. Ct. 793 (1967)."[3]

Rhay appealed and Rhinehart has filed a cross-appeal objecting to the district court's refusal to hear evidence concerning his equal protection claim.

II. *STATEMENTS OF THE PRINCIPAL WITNESS, MILLER*

In our remand to the district court, we noted Rhinehart's claim that "perjured testimony was knowingly used by the state"[4] and ordered an evidentiary hearing on this point because the adequacy of previous state court findings "has been subjected to serious doubt by new evidence contained in the principal witness' latest retraction."[5]

The district court went somewhat beyond the scope of the remand order in its inquiry into matters other than the retraction by Miller. We shall, however, examine in detail the numerous statements which Miller has given during the course of these proceedings to illustrate our conclusion that the statements themselves do not substantiate Rhinehart's claim that Miller perjured himself with the knowledge of the state.

All told, Miller has related his side of this story six times! In addition to his testimony at trial as recounted above, he has signed five statements which alternately affirm and deny the charge that an act of oral sodomy took place.

(a) *First statement, April 13, 1965, confirming the act.*

Miller's first statement was given to Seattle police on April 13, 1965, while he was in the Seattle Youth Center awaiting placement in a proper home. It is consistent with his trial testimony, reciting his meeting with Rhinehart, the act of sodomy, the payment of $15, and a detailed description of Rhinehart and his apartment.

(b) *Second statement, May 17, 1965, denying the act.*

His second statement was given at the office of Rhinehart's trial counsel on May 17, 1965, prior to Rhinehart's trial, following his contact by Mrs. Lemmon. Miller there denied any sexual act with Rhinehart and stated that he had signed the original statement because of police pressure. Miller said he had gone to Rhinehart's home, confided his problems and received advice. This conflicts with Rhinehart's trail testimony to the extent that Rhinehart testified that while he did give Miller a ride in his car he did not take Miller to his apartment for any purpose.

(c) *Third statement, June 11, 1965, confirming the act.*

Miller gave his third written statement to the police on June 11, 1965, a month before the trial began. He reaffirmed the facts originally given as to the commission of the sexual act, etc., and explained the second statement by the promise of the ticket to Alaska. He said he had copied and signed a statement prepared by someone else. Subsequently he was told that he would not get the Alaska trip but instead was given $80 worth of new clothing and some cash. He repeated this explanation when he testified at Rhinehart's trial.

(d) *Fourth statement, September 26, 1966, denying the act.*

Miller's fourth statement was also given to Rhinehart's attorney on September 26, 1966, following the conviction but during the pendency of the appeal to the Washington Supreme Court. It is somewhat more consistent with Rhinehart's trial testimony in that Miller denied ever having been to Rhinehart's home. He said that he gave the

statement to Mrs. Lemmon because it was true. This does not, however, explain why he indicated to Mrs. Lemmon that he had gone to Rhinehart's home for counseling and now denies ever having been there.

This fourth statement was thus a part of the record before us when Rhinehart appealed the denial of his petition for writ of habeas corpus and it was this "latest retraction" that formed the basis of our remand to the district court.

(e) *Fifth statement, October 28, 1969, confirming the act.*

Miller's fifth statement was given to two members of the staff of the Washington Attorney General on October 28, 1969, following our remand to the district court. At that time, Miller was in the *Oregon* State Correctional Institution. Miller reaffirmed his trial testimony, and explained that he gave the September 26, 1966 statement to Rhinehart's attorney because he had gone to Rhinehart's apartment at the urging of a friend who said that Rhinehart had given him a car to search for Miller and that if Miller would go to Rhinehart's apartment, he (the friend) had been told that the car would be his to keep.

In fairness to counsel, we hasten to point out that Miller's fourth statement (September 26, 1966) stated that counsel had "questioned him hard" about all this and repeatedly warned him that he wanted only the truth, no matter how it affected his client. While Miller subsequently denied the majority of that statement, he specifically reaffirmed this conduct of counsel and we feel compelled to point out that there is no suggestion whatever that Rhinehart's present attorney who has handled this matter with

considerable skill and diligence had anything to do with the substantive content of Miller's fourth statement.

At the conclusion of this fifth statement, Miller said it was made of his free will without coercion or promise of leniency. We think that statement is entitled to considerable weight since Miller was at that time in custody in *Oregon*. While he may not have been happy with it, Rhinehart apparently decided not to pursue Miller further since counsel stipulated that Miller's most recent statement would be admitted at the evidentiary hearing before the district court in lieu of a deposition where both parties might examine him.

(g) *Conclusion*

At this point in the proceedings, we believe that the record before the district court, by stipulation of counsel, was such that further inquiry was unnecessary and that any doubt created by Miller's 1966 statement was dispelled.[6] On this basis alone we believe that the record fails to show either perjured testimony or knowing use by the state and that Rhinehart's writ of habeas corpus should have been denied. However, since the district court inquired further, we consider the remaining questions raised by the evidentiary hearing which ultimately led to the district court's order of retrial of release.

III. *SUPPRESSED EVIDENCE*

The district court concluded that Rhinehart's conviction violated due process because it was obtained during a trial at which evidence was "suppressed" as that term has been defined in recent decisions of the Supreme Court, particularly *Giles v. Maryland*, 386 U.S. 66 (1967). First, we

consider other cases prior to *Giles* to point up the crucial question presented: What constitutes suppression of evidence violative of due process?

This review demonstrates that due process is violated only where there is false testimony which is knowingly used by the state during criminal proceedings. The circumstances of this case not only convince us that the testimony in question was not false but also that it was not, per the explicit findings of the district court, knowingly used by the state.

It is clear that the state may not use the false testimony of a witness where the prosecutor or other representative of the state knows the testimony to be false.[7] This principle applies equally where the testimony is unsolicited by the state but allowed to go uncorrected.[8] It makes no difference whether the false testimony goes to substantive aspects of the offense,[9] the credibility of the witness,[10] or the ultimate punishment of the accused.[11] Further, it is irrelevant that the prosecutor acted in good faith if in fact he knew the testimony was false.[12] Finally, the defense need not show that the true state of the facts would necessarily have resulted in an acquittal since "[t]he false testimony used by the State in securing the conviction . . . may have had an effect on the outcome of the trial."[13]

The first question, therefore, is whether there was in fact false testimony. Without explicitly saying that certain portions of the testimony were false, the district court suggested that the testimony on Miller's status at the time of his first statement, his testimony that Rhinehart gave him $15 and Officer Von Allmen's testimony were somehow less than true and that the true state of facts was suppressed.

(a) *Miller's status at the time of his original statement to the police.*

The prosecution emphasized to the jury that Miller's original statement to the police was entitled to great weight because he had been cleared of the car prowling charge and had nothing to gain. Miller accurately appraised the jury of the true facts at the time:

"Q. Where did he [Officer Von Allmen] find you?

"A. In the Youth Center.

"Q. In other words, you were still in custody?

"A. Yes, I was still in—they never let me out yet.

"Q. Didn't you say the judge said you could go home?

"A. They said I could.

"Q. But you hadn't been let out?

"A. I hadn't been let out, yes."

The jury knew of his continuing detention at the time the statement was made although he was not actually released from custody until two days later and a formal order was not signed until some time thereafter.[14]

There was no false testimony concerning Miller's status at the time the original statement was given.

(b) *Miller's testimony that Rhinehart gave him $15.*

Rhinehart and the district court decision[15] suggest that Miller's testimony that Rhinehart gave him $15 must have been false because the records of the Youth Service Center show that he had but $6.06 when arrested on the car prowling charge. This fails to take into account that he spent nearly ten hours in a corner restaurant between the time he met Rhinehart and the time he was arrested. Thus, the

Youth Center records do not establish that this testimony was false.

Further, Miller did not testify that he had all of this money with him when he was arrested.[16]

(c) *Officer Von Allmen's testimony*

To support the defense theory that Miller had solicited Rhinehart unsuccessfully, Officer Von Allmen was interrogated about his knowledge of similar activity on Miller's part. He said that he had no direct personal knowledge of any incidents of solicitation by Miller.[17]

This is said to be false[18] because Von Allmen had previously written of Miller, "Subject is known to hustle homo's." This appears in a police report filed by Von Allmen after Miller was picked up at home following his failure to appear for the first Rhinehart trial.

In addition, a parole violation report filed thereafter by the juvenile authorities indicated:

> "*Suspicions*: Officer Von Allmen of the Seattle Police Department feels that Jim has been having more homosexual contact in the last two weeks for monetary reasons. While on the run between June 7th and June 11th, Jim was staying overnight in the Green Parrot Theater. This is a homosexual hangout. It is not believed that Jim is seriously homosexual but it is felt that he has taken up this method to get spending money."

From these statements, Rhinehart argues that Von Allmen falsely testified when he said that he had no knowledge of any incidents of solicitation by Miller. Von Allmen testified at the evidentiary hearing before the district court and stated that, when he made this statement, he "was merely making an assumption." He indicated that he knew

of no incidents where Miller had actually solicited homosexuals and that his report was based on the fact that Miller had been frequenting a known homosexual rendezvous. He assumed from that (and from Miller's contact with Rhinehart) that Miller was involved with homosexuals, probably for money.

The record shows that Von Allmen has twice testified under oath that he had no direct personal knowledge of Miller having solicited homosexuals. The unsworn cryptic statement in his police department report (and the juvenile report setting forth his suspicions) do not make this testimony false. He may have had suspicions but no knowledge of specific incidents.

This aspect was well fortified by the *direct* testimony of a defense witness, McClure, who told the jury that he had been solicited by Miller. To the extent that Von Allmen's suspicions were helpful to the defense, no "suppression" thereof was violative of due process. Even assuming that any information was suppressed we cannot conclude that due process requires reversal. Due process does not require "that convictions ought to be reversed on the ground that information merely repetitious, cumulative, or embellishing of facts otherwise known to the defense or presented to the court . . . was not disclosed to defense counsel."[19]

The theory that Miller was a male prostitute was presented to the jury by the McClure testimony. Von Allmen's suspicions would have been of little assistance. Assuming that he would have been allowed to testify as to his suspicions had he been asked,[20] the failure to clarify the point was the result of inadequate cross-examination rather than the knowing use of false testimony.[21]

IV. *THE EFFECT OF GILES*

We do not believe that *Giles v. Maryland*, 386 U.S. 66 (1967), relied upon by Rhinehart and the district court, changes the basic rules concerning suppression of evidence and knowing use of false testimony by the state. The Court in *Giles* specifically declined to decide "whether the prosecution's constitutional duty to disclose extends to all evidence admissible and useful to the defense, and the degree of prejudice which must be shown to make necessary a new trial."[22] The lack of a majority opinion plus the differing views taken by the concurring and dissenting justices suggest numerous possible interpretations of the effect of that decision.[23]

As we view *Giles*, the result was based in part upon prosecutorial knowledge[24] of the reports involved there combined with complete frustration of defense efforts to obtain the information.[25] Here, the district court explicitly found that the prosecutor was unaware of the police and juvenile reports[26] and the record clearly shows a total lack of effort by the defense to secure these reports despite the fact that the defense was well aware of Miller's involvement with the police and juvenile authorities.

This being neither a case of deliberate use by the prosecutor of false testimony nor a frustrated effort by the defense to obtain information, the record must show" a substantially higher probability that disclosure of the evidence to the defense would have altered the result."[27] We have seen that the testimony used was not, in fact, false and knowledge by the defense of the reports would have been helpful only to the extent that they may have assisted in Miller's impeachment.

The jury may have believed the defense theory that Miller was a male prostitute and still not acquitted Rhinehart since the statute under which he was prosecuted applies without regard to who was the instigator. The jury would have to conclude that not only did Miller initiate this activity but that Rhinehart refused the offer. There is nothing in these reports to support that aspect of the defense.

In short, this is not a case like *Giles* where the defense theory (consent), if believed, would have resulted in acquittal. Rather this information would have been helpful only to the extent that it impeached the testimony of Miller and further questioned his credibility. The credibility of Miller was already so substantially in question[28] that we cannot believe that this additional information would have altered the result.

We are not suggesting that there may not be cases where, despite lack of prosecutorial knowledge or defense efforts, the information later revealed might be such as to raise some serious question as to the likelihood of a different result. No new theory is advanced as a result of this information and we think it cumulative at best.[29]

V. *EQUAL PROTECTION.*

Rhinehart's basic contention here is that he was denied equal protection because he was singled out for arrest under the state sodomy statute. He offered to prove this contention in the district court with affidavits to establish that homosexual activity regularly takes place in specific centers of deviant activity in Seattle under the approving eyes of the Seattle police. Having heard the offer of proof as required by our remand,[30] the district court concluded

that even if Rhinehart were to establish his contention he would not make out a denial of equal protection. We agree.

First, his contention that he was "singled out" for prosecution was fully considered by the Washington Supreme Court[31] which ruled against him because the record amply establishes that there were numerous other prosecutions under this statute both before and after Rhinehart's. Second, it is quite clear that a claim that others violate a statute with impunity does not make out a denial of equal protection unless it is shown that there is some form of discrimination in the actual enforcement of the statute.[32]

VI. *CONCLUSION*

For the reasons set forth in Sections I-IV, *infra*, the judgment of the district court ordering Rhineharts' release or retrial is REVERSED.

FOOTNOTES

1. The Youth Center and Juvenile Court are located about one mile from police headquarters and from the King County Courthouse in which the county prosecutor has his office.

2. Pertinent Findings of Fact and Conclusions of Law from the district court's unreported decision are set forth in Appendix A hereto.

3. Conclusion of Law III, Appendix A, *infra*, at 5.

4. *Rhinehart v. Rhay*, 409 F.2d 208 (9th Cir. 1969).

5. *Id.*

6. In view of Miller's numerous statements alternately affirming and denying the sexual act we think it difficult to speak of "truth" in the abstract sense. We would first note, however, that Miller had once retracted his statement prior to trial and that the jury was informed of that retraction when it rendered its verdict of guilty. In many respects, the record is not significantly different than it was when the question of Miller's veracity was presented to the jury. That is, his latest statement affirms the act in question and explains why previous statements denying it were given. Further, we think it significant to note that all three statements confirming the incident are not only consistent with one another but also consistent with his trial testimony. The two statements denying it are inconsistent with each other in that the first stated that Miller had been to Rhinehart's home for counseling whereas the second, consistent with

Rhinehart's trial testimony, denied his having been there for any reason. Finally, we note that Miller has indicated why he gave each of the two statements denying the incident.

7. *Mooney v. Holohan*, 294 U.S. 103 (1935).

8. *Alcorta v. Texas*, 355 U.S. 28 (1957).

9. *Miller v. Pate*, 386 U.S. 1 (1967).

10. *Napue v. Illinois*, 360 U.S. 264 (1959).

11. *Brady v. Maryland*, 373 U.S. 83 (1963).

12. *Id.*

13. *Napue v. Illinois*, supra, n.10, at 272.

14. The district court's Findings of Fact I-IV are substantially in accord with our view of the record in this area. *See* Appendix A, *infra*, at 1-2.

15. *See* Finding of Fact V, Appendix A, *infra*, at 2-3.

16. On direct examination Miller testified that following the incident with Rhinehart he returned to downtown Seattle and thereafter went to the home of one of his friends for more money. They then went back downtown. The testimony at that point was:

"Q. Did you still have your money with you?

"A. Yes.

"Q. And then what happened after you got downtown, did you get involved in this other thing with the prowling of cars?

"A. Yes.

For this testimony alone there is some confusion as to the actual time sequence involved and, taken alone, it is argued that Miller testified falsely. However, on cross-examination the time sequence was clarified to show that Miller's arrest did not take place until around 11:00 a.m. and that the interim had been spent "goofing around" in the "corner restaurant." On the record as a whole, therefore, it is apparent that Miller did not testify that he had the $15 with him when he was arrested.

17. When asked about Miller's activities, Von Allmen said he had had no contact with him following his release from the Youth Center on April 15. The testimony then proceeded:

"Q. Did you have any way of knowing if he did anything gainful for a living?

"A. I would not, no.

"Q. Do you know whether there has been any incident of solicitation by him for immoral acts since that time?

"A. I have no knowledge of any.

18. *See* Finding of Fact VII, Appendix A, *infra*, at 3.

19. *Giles v. Maryland*, 386 U.S. 66, 98 (1967) (Fortas, J. concurring).

20. Von Allmen could undoubtedly have been called upon to testify as to Miller having spent time at places where homosexuals were known to congregate. It is, however, doubtful that he would have been allowed to testify as to his suspicions based on this knowledge. *See, e.g., Johnson v. Caughren*, 55 Wash. 125, 104 P. 170 (1909).

21. *See Birns v. Perini*, 426 F.2d 1288, 1291 (6th Cir. 1970), *petition for cert. filed*, 39 U.S.L.W. 3170 (U.S. Sept. 1, 1970) (No. 630).

22. *Giles v. Maryland*, *supra* n.19, at 74.

23. *Compare Birns v. Perini*, 426 F.2d 1288 (6th Cir. 1970), petition for cert. filed, 39 U.S.L.W. 3170 (U.S. Sept. 1, 1970) (No. 630), *with Hamric v. Bailey*, 386 F.2d 390 (4th Cir. 1967).

24. The precise extent to which the prosecutor was aware of the police and juvenile reports in *Giles* is somewhat unclear. As to the police reports, the court specifically found that the prosecutor had read them before trial. *Giles v. Maryland*, *supra* n.19, at 77, n.7. As to the activity of the complaining witness between the time of the alleged rape and the time of trial, it is also clear that the police lieutenant who conducted the investigation for the prosecution had been personally informed. *Id.* at 70-71.

25. Defense counsel in *Giles* attempted to secure information regarding certain juvenile court proceedings but was told that the information would not be made available. *Giles v. Maryland*, *supra* n.19, at 72. In addition, defense attempts to secure the police reports during post-conviction proceedings were similarly unsuccessful. *Id.* at 74.

26. The district court twice found that the prosecutor was not aware of this material:

> "The deputy prosecuting attorney was not personally aware of the evidence contained in the records. . . ." Finding of Fact VIII, Appendix A *infra*, at 4.
>
> "Such suppression, although unwitting and unintentional insofar as the prosecutor was concerned. . . ." Conclusion of Law III, Appendix A, *infra* at 5.

27. *United States v. Keogh*, 391 F.2d 138, 147 (2d Cir. 1968). *See also United States v. DeLeo*, 422 F.2d 487, 499 (1st Cir.), *cert. denied*, 397 U.S. 1037 (1970).

28. This is not a case where the witness' credibility was not previously questioned. The jury was aware that Miller had been in trouble with the police. They were also informed that he had once retracted his statement implicating Rhinehart in an act of sodomy (and then reaffirmed it) prior to trial. Defense counsel described Miller as "incorrigible at this point, a complete and utterly depraved child and an opportunist who seized on this particular opportunity to implicate somebody here for his own benefit." The prosecutor agreed with this analysis and told the jury that Miller was "essentially an ammoral [sic] individual; and I'm not sure that if Mr. Miller had anything to gain by it he wouldn't lie."

29. *See* note 19, *supra*, and accompanying text.

30. *Rhinehart v. Rhay*, 409 F.2d 208 (9th Cir. 1969).

31. *State v. Rhinehart*, 70 Wash.2d 649, 656, 424 P.2d 906, 913 (1967).

32. *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

APPENDIX A

District Court Findings of Fact and Conclusions of Law. Rhinehart v. Rhay, Civil Action No. 8447

(W.D. Wash., April 24, 1970).

FINDINGS OF FACT

I

At the State court trial of the Petitioner, the principal prosecution witness was James Miller, a sixteen-year-old boy. James Miller gave to law enforcement officers his first statement incriminating the Petitioner on April 13, 1965. On the day before, James Miller had been arrested on suspicion of a car prowling offense, and at the time that he gave such statement, he was still at the detention facilities where he had been held since his arrest. Several days later, but still prior to the trial of the Petitioner, he gave a statement to the Petitioner's attorney in which he repudiated the statement of April 13. Then, at the trial, he in turn repudiated the later statement and went back to his story of April 13.

II

Miller also testified at the trial that he had been cleared of all charges against him at the time that he gave the statement to the police on April 13, 1965.

III

The credibility of Miller at the trial of the Petitioner was an issue of major significance. This was acknowledged by the prosecuting attorney in his argument to the jury. The prosecuting attorney also expressed the view that James Miller would probably lie if he had anything to gain thereby. He insisted, however, that Miller's testimony should be accepted; that it was consistent with the statement of

April 13; and that such statement should be accepted and believed because on April 13 Miller had already been freed from the control of the authorities and thus had nothing to gain by cooperating with the police by giving an incriminatory story against the Petitioner. The prosecuting attorney asserted that there was no evidence to the contrary.

IV

The Juvenile Court records in King County Juvenile Court Cause No. 33572 indicate that James Miller attended a hearing on April 12, 1965, and no formal disposition was made of the charges against him at that time. (The affidavit of Dan Peyton and the offer of proof made by the Respondent indicate that the court announced that it was dismissing the car prowling charge for lack of evidence, but continued the matter and continued Miller's detention at the request of Daniel Peyton, King County Juvenile Court parole counsellor. The affidavit further indicates that from and after April 12, 1965, to the time of James Miller's release that Miller's liberty was dependent upon a recommendation to the Juvenile Court by Daniel Peyton.) James Miller was actually released from custody on April 15, 1965; he was not formally cleared of the car prowling charge until April 22, 1965.

V

Miller testified at the State court trial of the Petitioner that the Petitioner had paid Miller $15.00 for an act of sodomy. He further testified that at the time he was arrested, he still had the $15.00 allegedly given him by the Petitioner. The Youth Service Center is a detention facility maintained in connection with the King County Juvenile Court. The Youth Service Center property card prepared

at the time of Miller's arrest shows that Miller had but $6.06 on his person at the time that he was arrested.

VI

Included within the issue of James Miller's credibility at the trial was the question of whether or not he was a male prostitute or otherwise knowledgeable in homosexual activities, as opposed to having been an innocent victim of the Petitioner's advances.

VII

At the time of the Petitioner's State court trial on July 14 and 15, 1965, Officer Von Allmen testified that he had no knowledge of Miller's solicitation of homosexuals. However, Officer Von Allmen, in his SPD Person Investigated Report dated June 16, 1965, recited that "the subject is known to hustle homos." The Juvenile Court document entitled "Parole Violation Report" of Daniel Peyton dated June 14, 1965, also stated in part as follows:

> "Officer Von Allmen of the Seattle Police Department feels that Jim has been having more homosexual contact in the last two weeks for monetary reasons. While on the run between June 7th and June 11th, Jim was staying overnight in the Green Parrot Theater. This is a homosexual hangout. It is not believed that Jim is seriously homosexual, but it is felt that he has taken up this method to get spending money."

VIII

Thus, the records of the Juvenile Court, the Youth Service Center, and the Seattle Police Department contained highly relevant information to the effect that on April 13, 1965, Miller was still in custody of law enforcement authorities and remained in such custody for two additional days. Also, as noted above, such records contained additional evidence pertinent to the credibility of

Miller. The deputy prosecuting attorney was not personally aware of the evidence contained in the records mentioned in this paragraph, but such records were available to him and they were not available to the Petitioner or his attorney.

IX

The Petitioner's offer of proof with respect to his claim of denial of equal protection of the laws, even if true, does not establish that his constitutional rights were violated in this respect. Such offer of proof was therefore rejected.

* * * *

CONCLUSIONS OF LAW

* * * *

III

The Petitioner's conviction was obtained in violation of the due process clause of the United States Constitution in that he was convicted of a crime by a trial in a State court in which material evidence in the possession of the State was withheld from him and therefore was suppressed. Such suppression, although unwitting and unintentional insofar as the prosecutor was concerned, was a "knowing" suppression in the sense required by the due process clause and the cases decided thereunder, such as *Giles v. Maryland*, 386 U.S. 71, 87 S. Ct. 793 (1967).

* * * *

VI

The Petitioner's conviction should be vacated and the charges against him dismissed with prejudice unless the Petitioner is retried within sixty days of the date of the entry of the Order hereon.

* * * *

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEITH MILTON RHINEHART, *Petitioner-Appellee,* v. B. J. RHAY, Superintendent, Washington State Penitentiary, *Respondent-Appellant.*	No. 26,301
KEITH MILTON RHINEHART, *Petitioner-Appellee,* v. B. J. RHAY, Superintendent, Washington State Penitentiary, *Respondent-Appellant.*	No. 26,098 ORDER

Before: KOELSCH, CARTER and WRIGHT, Circuit Judges.

The panel as constituted in the above cases voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The opinion of this court on page 1, paragraph 2, of the slip opinion is amended to read as follows: "We reverse because we believe that the ruling of the district court poses a standard of state prosecutorial conduct which is unrealistic."*

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the matter. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

DATED:

*_Lessard v. Dickson_, 394 F.2d 88 (9th Cir. 1968) and _Lee v. United States_, 388 F.2d 737 (9th Cir. 1968).

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEITH MILTON RHINEHART, *Petitioner-Appellant,* v. B. J. RHAY, Superintendent, Washington State Penitentiary, *Respondent-Appellee.*	No. 26,301
KEITH MILTON RHINEHART, *Petitioner-Appellant,* v. B. J. RHAY, Superintendent, Washington State Penitentiary, *Respondent-Appellee.*	No. 26,098

ORDER STAYING ISSUANCE OF MANDATE

Upon application of MAX D. CRITTENDEN, counsel for the Appellee/Cross Appellant, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41(a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Appellee/Cross Appellant herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before MAY 19, 1971.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

s/ EUGENE A. WRIGHT
United States Circuit Judge

Dated: San Francisco, Calif.
April 19, 1971

APPENDIX D

1. CONSTITUTION OF THE UNITED STATES

(a) *First Amendment:*

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievanees."

(b) *Fifth Amendment:*

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

(c) *Fourteenth Amendment, Section 1:*

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. LAWS OF THE STATE OF WASHINGTON

Revised Code of Washington 9.79.100:

"*9.79.100 Sodomy—Penalties.* Every person who

shall carnally know in any manner any animal or bird; or shall carnally know any male or female person by the anus or with the mouth or tongue; or who shall voluntarily submit to such carnal knowledge; or who shall attempt sexual intercourse with a dead body, shall be guilty of sodomy and shall be punshed as follows:

"(1) When such act is committed upon a child under the age of fifteen years, by imprisonment in the state penitentiary for not more than twenty years.

"(2) In all other cases by imprisonment in the state penitentiary for not more than ten years."

APPENDIX E

Text of Affidavit of James Miller (R. 10-12)

STATE OF WASHINGTON }
COUNTY OF KING } ss.

JAMES MILLER, being first duly sworn on oath, deposes and says:

1. I am the James Miller who testified against Keith Milton Rhinehart in the criminal case against him in King County, Washington Superior Court where he was charged with sodomy. The testimony I gave was false.

2. After being picked up for car prowling by some policemen, two other officers from the Seattle Police Department, one of whom was Officer Von Allmon, questioned me about the time I spent with Mr. Rhinehart on the morning that I was picked up. The officers had a file or files on Mr. Rhinehart. I did most of my talking to the officer other than Officer Von Allmon. This officer told me if I did not "Cooperate" I would get into trouble. My understanding was that if I didn't give them something which would permit them to arrest Mr. Rhinehart that I would undoubtedly continue to be confined and might be returned to Fort Warden where I had been previously detained. I was on parole at the time.

3. The information in the statement about Mr. Rhinehart's home and what was in it and where it was located was all supplied to me by the police officer. He questioned me in such a way that I knew the answers that he wanted. He would say, "Did you see a round bed in his room?" and I would know from the way he asked the question that there must be one there so I would tell him that I did. I

was not in Mr. Rhinehart's home and my testimony in this respect was not true.

4. Mr. Rhinehart did not commit sodomy on me or any sexual act of any kind.

5. I gave Mrs. Lemmon the statement denying any sexual act because it was true.

6. After I did not show up for the first trial, the police officers came and picked me up and sent me to Cascadia. I do not know why I was sent there because I had not done anything wrong.

7. I testified the way I did at the trial because I was under pressure. I felt that if I told the truth, the police officers who patrol First Avenue and the other areas that I like to be in would be particularly watchful of me and my freedom would be substantially deprived. I was also in Cascadia at the time and felt that if I told the truth it certainly wouldn't do any good as far as getting me released was concerned.

8. After I gave the testimony I was sent to Green Hill for two weeks and then released.

9. I know what it's like to be cooped up in jail and it bothers me that my false testimony will cause someone else to be in such a bad position.

10. Since the trial I have been to the Prosecuting Attorney's office on at least two occasions to see if I could get clothes which were in evidence back. They wouldn't give them to me, which upset me because I need the clothing and don't have much clothing at all. I know that there is nothing anybody can do about getting my clothes back but it still makes me upset. My desire to get my clothes back hasn't anything to do with my giving this statement.

I also know that my giving this statement won't in any way help me get my clothes back.

11. Since the trial I have seen Mr. Rhinehart on two occasions. On one occasion I went up to his house along with several other people because I wanted to square this matter. I saw him once thereafter on the street but only to exchange hellos. When at his house along with these other people, I told all of them that nothing had happened, which was the truth.

12. On September 9, 1966 I called Malcolm L. Edwards, Mr. Rhinehart's attorney. Mr. Rhinehart had given me Mr. Edwards' name and phone number when I was at his house along with these other people. I called Mr. Edwards because Mr. Rhinehart said that was the only way that matters could be squared; that it wasn't enough for me just to tell him and these other people that what I had testified to was false. Mr. Edwards supplied me with transportation to and from his office. I called him voluntarily and he questioned me for about an hour on that day and I gave voluntary answers. Another person was in the room during the questioning. He was a law student who was doing some work for Mr. Edwards.

13. Mr. Edwards told me when we first started talking that all he wanted to hear was the truth. He said he didn't care if the truth was for or against his client, so long as he got the truth. He said that he could best represent his client by knowing the truth. The truth is what I told him. Nothing happened between Mr. Rhinehart and myself. Mr. Edwards did not suggest to me or tell me in any way what I should say. He just asked questions and didn't accept what I said without questioning me pretty hard.

14. No one has given me or promised to give me anything in order to get me to give any affidavit or repudiate my testimony in any way. I am doing this strictly voluntarily.

15. At our conference, Mr. Edwards told me that he knew I could not read. He asked me that if he prepared an affidavit, would I come in and he would read it to me. I asked him how I would know for sure what I was signing. He suggested that if I had any concern about this and that I could bring anyone in with me that I liked and have them read it to me and then I would sign it. The affidavit has been read to me, including this part, and the affidavit is true.

/s/ JAMES G. MILLER

Subscribed and sworn to before me
this 26th day of September, 1966.

/s/ MALCOLM L. EDWARDS
Notary Public in and for the state
of Washington, residing at Seattle.

APPENDIX F

Portions of Statement of the Case From Brief of Appellant In First Appeal to Ninth Circuit Court, *Rhinehart v. Rhay*, 409 F.2d 208 (1969)

All of the factual material referred to in this brief comes directly from appellant's Petition for Writ of Habeas Corpus (R. 5-9).

Keith Milton Rhinehart is a 29-year-old ordained minister of the Aquarian Foundation in Seattle, Washington. The Foundation maintains a church in the Capitol Hill area of Seattle, holds regular church meetings, and maintains and operates a Sunday School for the children of church members. The Seattle church has approximately 600 members. Auxiliary churches have been established in Spokane, Washington, and in Chicago, Illinois, and in Honolulu, Hawaii (R. 5).

The Aquarian Foundation attempts to provide spiritual help to all interested persons including unwed mothers, ex-convicts, persons of interracial marriage, homosexuals and lesbians. The Foundation, like other religious faiths, concerns itself with and studies sexual morality. One of the basic religious beliefs of Rhinehart and members of his church is that all forms of private consensual sexual expression between reasonably biologically mature individuals which does not threaten the sanctity of a marriage or the preservation of a family are a matter of personal preference and not the proper subject matter of the exercise of the police power of the state. The church takes the position that persons who by physical makeup or conscious desire are inclined toward sexual relationships with the same sex should be permitted to exercise these private sexual desires with the same anonymity that is granted to the heterosexual (R. 5).

Rhinehart is a spiritualist medium of considerable prominence. He has lived in Seattle, Washington, for over ten years and has actively practiced his particular skill as a medium. He is highly vocal and zealous in his assertion of his beliefs and those of the Aquarian Foundation including those related to sexual morality. In addition, Rhinehart was extremely individualistic in dress and appearance—for a long time before his arrest and during his trial he wore a dark beard. The Seattle Police Department bunco and morals details each had files on Rhinehart covering a span of over ten years even though Rhinehart had never been arrested or charged with a crime in the over ten years he had been in Seattle and had but one prior conviction of a misdemeanor when a teenager in Denver, Colorado. Members of the police force were frequent visitors to his home. The police frequently harassed Rhinehart in the exercise of his religious activities and in his home. (R. 5).

On April 6, 1965 Keith M. Rhinehart appeared on the first of what was to be a long series of hourly television programs featuring interviews with internationally famous persons. The purpose of the program was to discuss moral, philosophical and spiritual problems and acquaint the viewers with the practices and beliefs of the Aquarian Foundation. The program interviews had been filmed by Rhinehart and television production technicians at the expense of the Foundation on a recent trip around the world made for that purpose. The first program consisted for the most part of a filmed interview between Rhinehart and Mrs. Aldous Huxley. At the conclusion of the program an ex-convict, a lesbian, a homosexual, an unwed mother, and a couple who were parties to an interracial

marriage, were each given a brief opportunity to voice their views. The program concluded with Rhinehart's appeal to the viewers to understand all of these people as human beings created by God and afford them the privilege of privacy of action free from the police power of the state as long as their actions did not harm any other members of society (R. 5, 6).

One week later Rhinehart was arrested and accused of the crime of sodomy. * * *

The Seattle Police Department had files on Rhinehart which included an advertisement for the TV program shown scarcely one week before containing Rhinehart's picture; a mug shot from Rhinehart's only conviction and that a misdemeanor when he was a teenager in Colorado; and other pictures and material taken and gathered over a 10-year period (Tr. 7).

Seventeen affidavits: a *pro se* memorandum; Articles of Incorporation and By-Laws of the Aquarian Foundation; another memorandum and a letter from Rhinehart to the trial judge in support of Rhinehart's post-trial motions were submitted prior to judgment and sentence being entered against him. In the letter to the judge, Rhinehart asked the court to permit him to call witnesses to provide a more complete picture of the discriminatory enforcement pattern of the sodomy statute in the City of Seattle than was provided by the affidavits (R. 7).

The contents of the affidavits directly called to the attention of the court are summarized in this and following paragraphs. There were at least four public gathering places, taverns of after hours spots in the City of Seattle which have for a substantial number of years catered al-

most exclusively to male and female homosexuals. These were named. Each of these establishments is and has been frequented regularly by uniformed Seattle police officers on their beat or as doormen. In addition, homosexual parties with uniformed policemen and officers in attendance as doormen or to keep order are not uncommon in certain other establishments. Attendance at such functions may exceed 300 persons. The regular homosexual public gathering places are frequently packed. Attendance of 200 or more persons at one of these establishments is not uncommon (R. 8).

The age of the persons in attendance at these establishments range from a little over 15 years to over 40 years of age. A significant proportion of those in attendance are in the teenage range from 15 through 18 (R. 8).

The persons in attendance drink beer in taverns and beer and hard liquor at the after-hours establishments. Homosexual dancing (males with males and females with females) is typical. A few of the persons in attendance will wear portions of the attire of the person of the opposite sex. The dancing is accompanied with French kissing, genital and anal fondling, and other forms of contact to produce homosexual stimulation. Male couples and female couples commonly and without apparent concern continue these forms of sexual stimulation at booths and tables and will even openly fondle each other's exposed or semi-exposed genitals. Performance of actual acts of sodomy involving genital penetration into the partner's mouth occurs in some of the more dimly lit, yet public, portions of the establishments. Homosexual propositions (frequently for a price) are made in the immediate presence of police officers. These persons are not bothered or arrested by the

police and continue to attend the establishments aware of police presence and aware that they will not be followed for purposes of detection and arrest or arrested as a result of their activities. Some of the affidavits were sworn statements by married persons that they had engaged and continue to engage in acts made criminal by the sodomy statute, namely, oral sodomy (R. 8).

One of the affiants stated that he had inquired of the police department about the Aquarian Foundation, had been referred within the department to an officer who advised him that he should stay away from the Aquarian Foundation and Rhinehart as the police were out to "get" the appellant. Rhinehart also offered to prove that the sodomy statute was not applied equally and was being used by law enforcement officials as a "club of vengeance" and a "tool of the police" used against Rhinehart who they had "singled out for punishment." He further offered

> "to introduce evidence that homosexuals are permitted to participate in sexual activities in public bars and clubs under the supervision and control of the Seattle Police Department and with their direct knowledge and assent. Thousands of persons from every walk of life are permitted to violate this statute *under the watchful eye of the Seattle Police Department,* yet the defendant (appellant) is singled out for prosecution for allegedly committing the same acts." (R. 8, 9). (Explanation of italics at pp. 19, 20, note 3 of this Brief.)

While the matter was on appeal to the Supreme Court of the State of Washington, an affidavit was submitted in connection with Rhinehart's Motion to the State Supreme Court for leave to file a Motion for New Trial. This affidavit by a third-year law student summarized the results of that student's investigation of sodomy arrests in the four years

immediately preceding the arrest of Rhinehart. There were but 104 arrests for sodomy in King County in this four-year period. The investigator was unable to obtain adequate information as to 12 of these arrests. As to the remaining 92, seven acts involved the use of force; two involved the use of duress; 58 involved a participant 15 years of age or younger; 14 involved acts committed in public; two involved substantial outside pressure from members of the family to arrest; and nine involved an apparent police or prosecuting attorney desire to arrest for reasons other than any violation of the sodomy statute. Thus, persons were just not arrested in King County for homosexual acts committed in private between persons of reasonable biological maturity (16 years of age or older) without the use of force or improper duress unless the police or prosecuting attorney had a desire to arrest the person for reasons other than the violation of the sodomy statute or, in a rare situation, unless members of the family exerted sufficient outside pressure on the police and prosecuting attorney and forced them to arrest (R. 9).

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JUL 11 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1970

No. ~~1709~~ 70-170

KEITH MILTON RHINEHART, *Petitioner,*

v.

B. J. RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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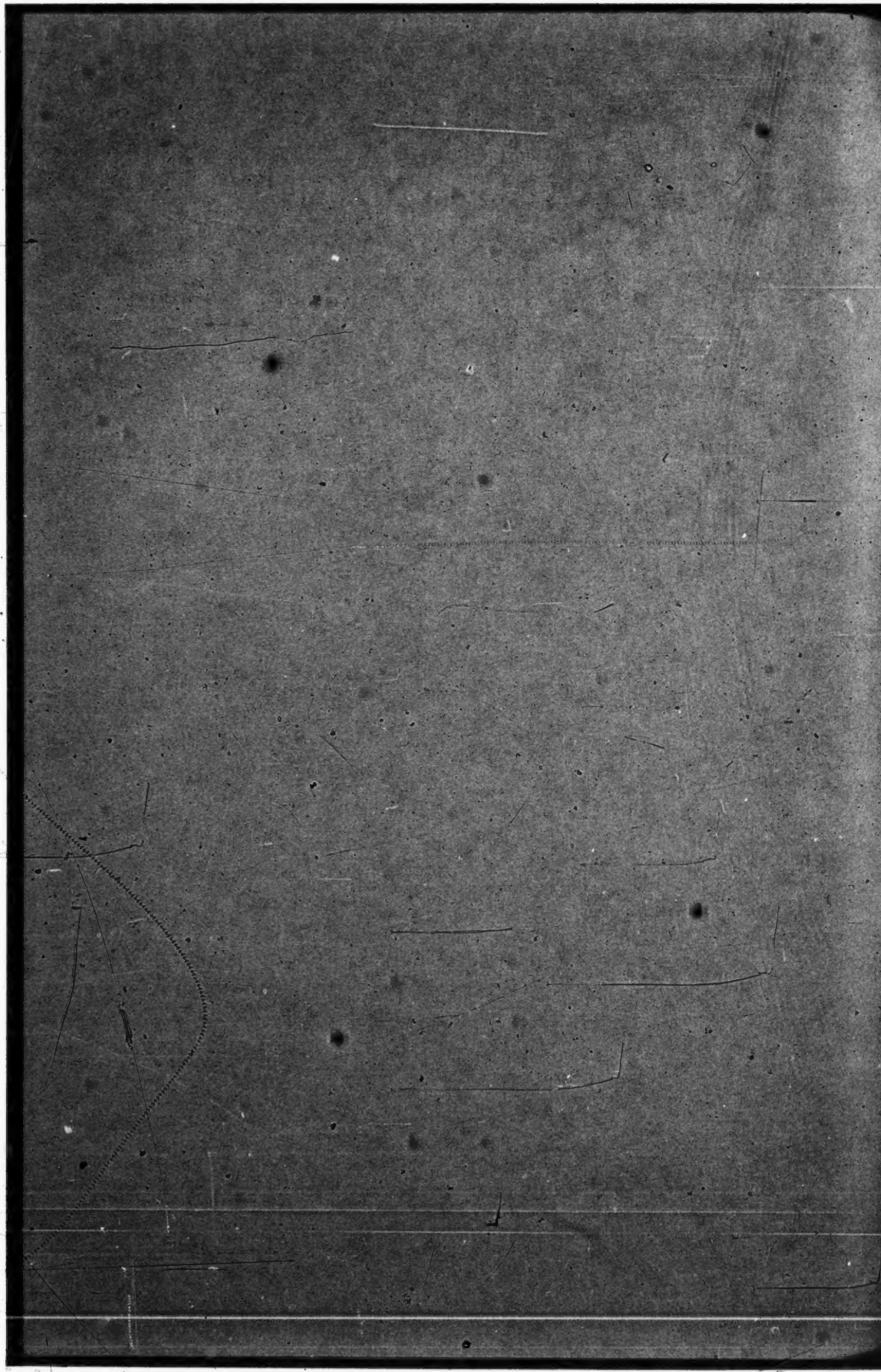

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IN THE

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OCTOBER TERM, 1970

No. 1709

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B. J. RHAY, SUPERINTENDENT, WASHINGTON STATE PENITENTIARY,

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT

I

STATEMENT OF THE CASE

Pursuant to Rules of the Supreme Court, Rule 40, 3, respondent does make a counter statement of the case for the purpose of enhancing clarity of the circumstances of this case, and in order to provide a coherent chronology of the facts involved. A succinct summary of the factual background of this

case is contained in the Opinion of the Ninth Circuit Court of Appeals, being Rhinehart v. Rhay, Nos. 26301 and 26098, decided on March 11, 1971, the full text of which is printed in petitioner's Appendix A, pgs. A-1 to A-19, and attached to his Petition for Writ of Certiorari herein, but for more ready reference, the language of that opinion as to said factual statement is herewith quoted verbatim as the same appears on pages A-2 to A-7:

> Because of the peculiar history of the case and our conclusion to reverse, a somewhat lengthy recital of facts is necessary.
>
> Petitioner Rhinehart was convicted in December 1965, on a state charge of sodomy. The state's principal witnesses were James Miller and Seattle Police Officer William R. Von Allmen. Miller was then 16 years old and had had previous difficulties with the state juvenile authorities.
>
> He testified that he and two friends were standing on a street corner in downtown Seattle shortly after 1:00 a.m. on April 11, 1965. A light colored convertible automobile stopped across the street and its driver sounded the horn at them. Miller walked to the car and the driver, Rhinehart, initially indicated that he had mistaken Miller for someone else. He then asked Miller if he would like to make some money. Receiving an affirmative response, Rhinehart drove them to Rhinehart's apartment where Miller testified that an act of oral sodomy took place. Miller subsequently described in some de-

tail the interior and exterior of Rhinehart's apartment.

Miller testified that Rhinehart gave him $15 in currency and drove him to the business district where Miller rejoined his friends. Rhinehart wrote his phone number on a piece of paper and told Miller to call any time he wanted to earn more money.

Miller testified that he rejoined his friends at 1:30 a.m. and went to the home of one of them to get some more money. They went back down town and "goofed around all night." When asked for more details, Miller said they had spent most of their time in "a corner restaurant", the name of which he was unable to recall.

Some time later that morning, Miller and his friends were seen by Seattle police officers standing next to a parked car. At that time, approximately 11:00 a.m., they were taken in hand for suspicion of car prowling. Since he was 16 at the time, Miller was taken to the King County Youth Center and detained there over night.

The next morning he appeared before a Juvenile Court judge who determined that the evidence against him was insufficient and dropped the charges relating to the car prowling. Miller was not, however, released at that time because the juvenile authorities indicated to the court that Miller's mother was unable to control him and that he should remain at the Youth Center until proper home placement could be arranged. On April 15, Miller was released following arrangements for other living

quarters, and a formal order dismissing the charges was signed on April 22.

On April 13, following dismissal of the charges but while Miller was awaiting release from the Youth Center, he was visited by Officer Von Allmen. The officer inquired about his contact with Rhinehart the night before he was arrested. Miller said he didn't know for sure how Von Allmen heard about it but guessed the other two boys must have told him. Miller gave the facts and signed a statement which Von Allmen first prepared and reviewed with him.

The charge of sodomy was then filed against Rhinehart. Miller was subsequently released from the Youth Center and prior to trial was visited by a Mrs. Lemmon who was a friend of Rhinehart's and from time to time had attended services at the Aquarian Church where Rhinehart was an ordained minister.

After meeting Mrs. Lemmon, Miller went to the office of Rhinehart's trial counsel and signed a second statement, in which he said. "There was no sexual act of any description between Rev. Rhinehart and myself." He added that the police had influenced him to sign the original statement because "they were really out to get Rhinehart and they needed a statement from me to help them." He added that he had "met Rev. Rhinehart and he had taken me to his home where I had confided my problems to him and he had tried to help me."

Following his contact with Mrs. Lemmon and his new statement but still prior to the trial, Miller signed a third statement which repeated

the incident as he had originally reported it to the police. He repudiated the statement given to Rhinehart's attorney and explained that it had been given because he was anxious to leave Seattle and Mrs. Lemmon had promised him a ticket to Alaska if he would copy a statement she had prepared and sign it.

He said he was later told that he would not get the ticket but instead that she would buy him new clothes. He indicated that she had bought him $80 worth of clothing and she testified to the same effect, adding that she had done so for humanitarian reasons and that it had nothing to do with Miller's statement. Miller also said that Mrs. Lemmon had given him money at that time and on one additional occasion, a fact which Mrs. Lemmon also confirmed in her testimony.

Rhinehart testified to his version of the incident with Miller. He said that he had stopped and sounded his horn, thinking that Miller was the son of a member of his congregation. Learning his error, he told Miller but the boy expressed an interest in Rhinehart's car and asked for a ride. Rhinehart agreed.

As they were driving the boy told Rhinehart that he would permit Rhinehart to perform homosexual activity on him for a price. Rhinehart said he declined and told Miller that he was a minister and, though he knew many homosexuals, was not so inclined himself. He denied that Miller had been to his apartment for either sexual or counseling reasons.

The defense version therefore was that Miller was a male prostitute who had made unsuccess-

ful advances at Rhinehart. When Officer Von Allmen testified he was asked if he knew of any incidents of Miller "hustling" homosexuals and he replied that he did not.

To support this theory, the defense called a witness who testified that he had been approached by Miller, some time after the Rhinehart incident, at a homosexual rendezvous where Miller expressed willingness to engage in deviant conduct for a price.

The defense sought to show that Rhinehart had been singled out for prosecution because of his association with the Aquarian Foundation which advocates sexual freedom and because of his recent appearance on a television show with homosexuals and an interracial married couple.

In furtherance of this theory, the defense offered to prove the existence of other local homosexual gathering places where overt acts of homosexuality took place under the approving eyes of Seattle police officers. The offer of proof was rejected and is the basis of Rhinehart's cross-appeal, discussed in Section V, *infra*.

Rhinehart's conviction was appealed to the Washington Supreme Court which unanimously affirmed and subsequently denied a petition for rehearing. *State v. Rhinehart*, 70 Wash.2d 649, 424 P.2d 906 (1967). His petition for *certiorari* was denied by the Supreme Court. *Rhinehart v. Washington*, 389 U.S. 832 (1967).

After his incarceration in the Washington State Penitentiary, Rhinehart filed a petition for writ of *habeas corpus* in the federal district court. That petition was denied without hear-

ing and his appeal to this court resulted in a remand to the district court directing a hearing on the questions of equal protection and alleged use of perjured testimony. *Rhinehart v. Rhay*, 409 F.2d 208 (9th Cir. 1969).

After the remand, the district court heard detailed testimony on the circumstances of Rhinehart's trial and the several statements of Miller. The court concluded that Rhinehart's claimed denial of equal protection was without merit but ruled that he be retried or released within 60 days because his "conviction was obtained in violation of the due process clause of the United States Constitution in that he was convicted of a crime by a trial in a State court in which material evidence in the possession of the State was withheld from him and therefore was suppressed."

The district court went on to point out that, in its view of the evidence, "[s]uch suppression, although unwitting and unintentional insofar as the prosecutor was concerned, was a 'knowing' suppression in the sense required by the due process clause and the cases decided thereunder, such as *Giles v. Maryland*, 386 U.S. 71, 87 S. Ct. 793 (1967)."

Rhay appealed and Rhinehart has filed a cross-appeal objecting to the district court's refusal to hear evidence concerning his equal protection claim.

As disclosed by this Ninth Circuit Court Opinion, that Court reversed the District Court's vacation of petitioner's conviction on the knowing use of false testimony issue and affirmed the District

Court in all other respects. Thereafter the Ninth Circuit Court denied petitioner his Petition for Rehearing and rejected the suggestion of petitioner for a rehearing en banc (see Petition for Writ of Certiorari Appendix B, p. A-24).

As pointed out on pgs. 6 and 7 of the Ninth Circuit Court Opinion (see Petition for Writ of Certiorari, Appendix A, pgs. A-7 to A-10), the various statements given by the witness Miller are set forth in detail, and include a fourth and fifth statement in addition to those enumerated in the Circuit Court's factual background above quoted.

The fourth statement, denying the act, was given to petitioner's present attorney on September 26, 1966, and was subsequent to his conviction but was during the pendency of the appeal proceedings to the Washington State Supreme Court. It was this fourth statement which the first Ninth Circuit Court Opinion characterized as the "latest retraction" that formed the basis of the remand to the District Court (see Rhinehart v. Rhay, 409 F.2d 208 (9th Cir. 1969)).

Then, on October 28, 1969, witness Miller gave a fifth statement confirming the act. This statement was given to two members of the staff of the Washington State Attorney General following the remand to the District Court, and at a time when Miller was in an Oregon State correctional institution. Miller reaffirmed his trial testimony and the statements he

had given to the Seattle Police Department, that is, the first statement of April 13, 1965, and the third statement of June 11, 1965.

The Ninth Circuit Court, at this point in its Opinion, concluded as follows:

> At this point in the proceedings, we believe that the record before the District Court, by stipulation of counsel, was such that further inquiry was unnecessary and that any doubt created by Miller's 1966 statement was dispelled.[6] On this basis alone we believe that the record fails to show either perjured testimony or knowing use by the state and that Rhinehart's writ of habeas corpus should have been denied.

(See Petition for Certiorari Appendix, p. A-10)

In its footnote 6, the Ninth Circuit observed as follows (see p. 8, of the Opinion and Petition for Writ of Certiorari, Appendix A, pgs. A-17 to A-18):

> [6]In view of Miller's numerous statements alternately affirming and denying the sexual act we think it difficult to speak of "truth" in the abstract sense. We would first note, however, that Miller had once retracted his statement prior to trial and that the jury was informed of that retraction when it rendered its verdict of guilty. In many respects, the record is not significantly different than it was when the question of Miller's veracity was presented to the jury. That is, his latest statement affirms the act in question and explains why previous statements denying it were given. Further, we think it significant to note that all three statements confirming the

incident are not only consistent with one another but also consistent with his trial testimony. The two statements denying it are inconsistent with each other in that the first stated that Miller had been to Rhinehart's home for counseling whereas the second, consistent with Rhinehart's trial testimony, denied his having been there for any reason. Finally, we note that Miller has indicated why he gave each of the two statements denying the incident.

Petitioner, in a footnote on page 29 of his Petition for Writ of Certiorari and Brief, makes reference to certain materials filed by petitioner in the Ninth Circuit Court after the opinion was rendered but before the decision of that Court denying the Petition for Rehearing. As indicated in that footnote, "Respondent has filed an affidavit contradicting Miller's version of this meeting." The affidavit referred to is one executed by Darrell E. Lee, a King County Deputy Prosecuting Attorney assigned to the retrial of the case, and was prepared by him and submitted to counsel for the respondent shortly after the meeting with Miller in May of 1970.[1] This affida-

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[1]The body of said affidavit reads as follows:

Darrell E. Lee being duly sworn on oath deposes and says:

That he is a King County deputy prosesuting attorney and is assigned to the case of *State v. Keith Milton Rhinehart;*

That in preparation of said case for trial he has had occasion to interview James Miller and talk with Landon Estep, a Seattle attorney;

That during the first interview with James Miller in early May, 1970, your affiant was told by said Miller that he would lie to protect Keith Milton Rhinehart because said Rhinehart had already spent too much time in jail;

vit clearly reflects that once again Miller reiterated that the testimony given by him at the original trial was true, and that the statement he gave to Steve Way of the Washington Attorney General's office was true (this was the fifth statement of October 28, 1969, above referred to), and again confirmed that the act had been performed upon him by the petitioner. As shown by said affidavit the witness Miller had retained an attorney, Landon Estep, who

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That during the second interview with said Miller one week later, said Miller reiterated to your affiant that the testimony given by him at the original trial was true, that the affidavit he gave last fall to Steve Way of the Washington Attorney General's office was true, and that Keith Milton Rhinehart had performed oral sodomy upon him in 1965; he further told your affiant that he would leave the jurisdiction of the court, refuse to testify, claim he didn't remember the facts or simply lie to protect Keith Milton Rhinehart;

That on both occasions said Miller told your affiant that he has had contact with the defendant Rhinehart and on the second meeting told your affiant that he has continued his contact with said Rhinehart, has had a meeting with Rhinehart's attorney Malcolm Edwards and has employed an attorney to represent him in his dealings with this office;

That on May 8, 1970, Landon Estep called your affiant and stated that he was the attorney for James Miller and agreed with your affiant to appear with James Miller in the office of your affiant on May 14, 1970, for the purpose of taking an affidavit from said Miller;

That on May 20, 1970, said Landon Estep appeared at the office of your affiant and stated that he was unable to locate James Miller and he had been informed that Miller left town; further, said Estep informed your affiant that he represented James Miller in all matters concerning his use as a state witness;

That said Estep further informed your affiant that he represented said Miller gratuitously, that he was presently the paid attorney for Milton Rhinehart in two civil matters and that at one time he was the attorney for said Rhinehart in the criminal case for which said Miller is a witness;

Further your affiant saith not.

agreed to appear with Miller in the Deputy Prosecutor's office, and that the attorney alone thereafter appeared saying he was advised Miller had left town and that he was unable to locate him. With the disappearance of the witness Miller, the King County Prosecuting Attorney's office decided a retrial of the case was not feasible.

II

ARGUMENT OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

At the outset, respondent respectfully submits that the considerations governing review on certiorari are not present in this application, and consequently the cause should not be reviewed by this Court and the Petition for Writ of Certiorari should be denied. See Rules of the Supreme Court, Rule 19. See also this Court's recent affirmation of the abstention doctrine in *Younger v. Harris*, ... US ....., 27 L.Ed. 2d 669, 91 S.Ct. ..... (February 23, 1971); and *Samuels v. Mackell*, and *Fernandez v. Mackell*, ... US ....., 27 L.Ed.2d 688, 91 S.Ct. ..... (February 23, 1971).

Without retreating from this position, respondent will address itself to and endeavor to answer the various factual contentions and legal arguments contained in petitioner's brief in support of his Petition for Writ of Certiorari.

A. THE DUE PROCESS ISSUE

Contrary to petitioner's assertions on pages 10 and 11 of his brief, the Deputy Prosecuting Attorney, who conducted the state court trial, had not seen the Juvenile Court records at the time of that trial, nor was he personnally aware of the evidence contained in those records (Rep. Tr., Vol. 2, pg. 281; and District Court Findings of Fact VIII, and Conclusion of Law III, petitioner's Appendix A-22 and A-23). The Deputy Prosecutor did not indicate that "he might even have had the Juvenile Court records at Rhinehart's trial", as alleged on page 11 of petitioner's brief, he merely was referring to a statement on a report by Police Officer Von Allmen (see footnote to page 11 of petitioner's brief).

Also, as to the availability of the Juvenile Court records to defense counsel, the Prosecuting Attorney at the state court trial, testified at the evidentiary hearing that a person seeking information from a Juvenile Court file could do so by way of motion presented to the Juvenile Court, and this would hold true for Mr. Rhinehart's defense counsel as well as for the Prosecuting Attorney's office (Rep. Tr., Vol. 2, 281 and 282). This assertion of the Deputy Prosecuting Attorney is borne out by the provisions of Washington State Statutes, RCW 13.04.230, which provide inter alia, "* * * such records shall be kept open to the inspection of the child, his parents, or guardians, or attorney, and to such other persons as may secure a special order of the court

therefor." The record of the District Court evidentiary hearing clearly shows that no effort was made by the defense counsel to secure the police and Juvenile Court reports despite the fact that the defense knew of witness Miller's involvement with the police and juvenile authorities (Rep. Tr., Vol. 3, 315).

Petitioner complains in several places about the use of the affidavit of Juvenile Parole Counselor Daniel M. Peyton (ROA, Vol. II, pgs. 174-177, with attachments). This was with reference to the detention of Miller at the Youth Center until proper home placement could be arranged by said Counselor, which was after the dismissal of the car prowling charges by the Juvenile Court judge on the basis of insufficient evidence. It should be pointed out that this affidavit specifically was made part of the record by the District Court at the evidentiary hearing (See Tr. of March 6, 1970, pg. 14).

Petitioner's argument on the due process issue is based on his contention that false testimony was knowingly used by the state during petitioner's criminal proceedings. This argument was rejected by the Ninth Circuit Court which held this simply was not so, stating:

> The circumstances of this case not only convince us that the testimony in question was not false but also that it was not, per the explicit findings of the district court, knowingly used by the state.

(See petitioner's Appendix A, pg. A-11).

The Ninth Circuit Court then proceeded to deal specifically with the areas of claimed false testimony, and rejected all of them for the reasons therein stated (see petitioner's Appendix A, pgs. A-11 to A-15).

It is respondent's position that this holding of the Ninth Circuit Court was correct in all respects, and that not only the testimony in question was not false, but also that all of these areas were substantially before the jury in proper perspective and that the jury had an opportunity to consider them and in fact did so in judging both the credibility and the weight which should be given to such testimony.

Petitioner's contentions with reference to these due process testimonial areas are set forth generally in his brief on pgs. 19 through 29, and will be responded to at this point by the respondent.

1. **The $15.00 Question**

Miller did not, as alleged by the petitioner, testify that he had with him at the time of his arrest the $15.00 allegedly given to him by Rhinehart. The testimony of Miller at the state court trial, on direct examination (St. pgs. 36-37) and on cross-examination (St. pg. 42), was that he first met petitioner Rhinehart about 1:00 a.m., the morning of April 11, 1965 (St. pg. 30), and returned to the downtown area approximately one-half hour later

(St. pg. 36). Miller met his two friends at that time and they went to the home of one of the friends so that he could get some money from his father. They returned downtown and stayed "in this one restaurant, goofed around there all night." (St. pg. 42). After this, and around 11:00 o'clock in the morning, they were picked up by the police on the car prowling incident, and this occurred "where the car was."

James Miller thus stated that he had the money with him when they came back into town after being out to John's (one of the friends) place, and that after that they stayed around all night in the restaurant and were not picked up by the police until 11:00 o'clock in the morning. This means that James Miller had a period of approximately ten hours within which to dispose of part of the money, and this would be relatively easy to accomplish since they spent most of the time in a restaurant in downtown Seattle. At no time, did James Miller testify that he had the $15.00 intact at the time of his arrest by the Seattle Police officers. Under these circumstances, it is our position that the production of the property card at the time of trial would not have changed the results in any manner whatsoever, nor would this be a vehicle of any import with which to test the credibility of the witness Miller.

2. **The Car Prowling Incident**

There is no evidence to support this assertion that Miller testified falsely concerning his activities

in the car prowling incident when he was arrested by the police. The fact that Miller was a companion in a car prowling venture was clearly before the jury, and Miller's version is borne out by the fact that the Juvenile Court judge dismissed the car prowling charges against him due to insufficient evidence (see Statement of the Case above and St. pg. 89).

Here again, the total picture of Miller's credibility was already so substantially in question before the jury, that this additional information would not have changed the result. See Ninth Circuit Court's statement in its footnote 28, appearing in petitioner's Appendix A at pg. A-19, as follows:

> This is not a case where the witness' credibility was not previously questioned. The jury was aware that Miller had been in trouble with the police. They were also informed that he had once retracted his statement implicating Rhinehart in an act of sodomy (and then reaffirmed it) prior to trial. Defense counsel described Miller as "incorrigible at this point, a complete and utterly depraved child and an opportunist who seized on this particular opportunity to implicate somebody here for his own benefit." The prosecutor agreed with this analysis and told the jury that Miller was "essentially an amoral (sic) individual; and I'm not sure that if Mr. Miller had anything to gain by it he wouldn't lie."

3. **Officer Von Allmen's Testimony**

Contrary to petitioner's assertions, Officer Von

Allmen actually stated that he did not know of *any incident* of solicitation by him (Miller) for immoral acts, in other words that he had no direct personal knowledge of Miller's having solicited homosexuals (St. pg. 120). As pointed out by the Ninth Circuit Court (petitioner's Appendix A, pg. A-14),

> The record shows that Von Allmen has twice testified under oath that he had no direct personal knowledge of Miller having solicited homosexuals. The unsworn cryptic statement in his police department report (and the juvenile report setting forth his suspicions) do not make this testimony false. He may have had suspicions but no knowledge of specific incidents.

Further, on the same page of said Ninth Circuit Court of Appeals' Opinion, the court pointed out that this aspect, dealing with Miller's credibility, was clearly before the trial court jury by the direct testimony of a defense witness, McClure, who testified that he had been propositioned by Miller a month prior to the alleged Rhinehart incident (St. 167-184).

4. **The Timing of Miller's Statements to the Police Question**

Contrary to petitioner's assertions under this subhead, Miller did not testify that the only police officer he had talked to about the alleged act was Officer Von Allmen on April 13. Instead, Miller testified on direct examination before the jury as follows (St. pgs. 36-37):

Q And then what occurred after you got downtown, did you get involved in this other thing with the prowling of cars?
A Yes
Q And it was after you were picked up on that you did tell the investigating *officers* about *this* event? (Emphasis supplied)
A Yes
Q Subsequently did you take anyone to this place where the Reverend Rhinehart had taken you?
A Yes
Q Who would that be?
A Officer Von Allmen.

And on cross-examination, Miller further testified as follows (St. pages 54-55):

Q Let me ask you, Jim, did you not make a statement to some police officers shortly after your arrest?
A Yes
Q And to whom was that made?
A I don't--I can't recollect his name. It was down at the police station.
Q It was a police officer?
A Yes
Q Not Von Allmen?
A No, it wasn't.
Q Did that police officer, whatever his name is, talk to you at all about Mr. Rhinehart and his TV program?
A They never even knew nothing about Mr. Rhinehart then.
Q Who was it that showed you the TV Guide with the ad on it?

A Officer Von Allmen.
Q When did he do that?
A Two days after I got in the Youth Center, after I went to court.
Q That was the first you knew about it?
A Yes

Thus it is seen that Miller testified shortly after his arrest that he talked to police officers, that he told them about *this* event, and that the identity of petitioner Rhinehart was unknown to Miller at that time and until he was shown the TV guide in his conversations with Officer Von Allmen some two days later.

The next part of this subhead, and the contentions contained therein, have been covered and answered in the factual statement of this case wherein it is shown that the records reflect that the Juvenile Court judge, on April 12, 1965, dismissed the charges against Miller relating to car prowling because of insufficient evidence, but Miller was detained at the request of his Juvenile Parole Counselor until April 15 in order that proper home placement could be arranged for Miller. The order set forth in petitioner's brief on page 22 corroborates and bears this out.

5. Miller's Testimony and the Prosecutor's Argument Relative to Miller's Detention

Miller did not testify nor did the Deputy Prosecutor argue that Miller was in Cascadia as a result of a court hearing. Miller testified before the jury concerning his detention in the manner outlined in

the above statement of the case, and further testified that he was still detained and in custody, even after the Juvenile Court hearing, and that he was in this custodial status when Officer Von Allmen came to see him and took the statement from him (St. pg. 89).

The Deputy Prosecutor, in his opening argument, told the jury that Miller was then (that is at the time of the trial) "in confinement in Cascadia Youth Camp." The Deputy Prosecutor's said nothing about how Miller got to Cascadia, nor why he was confined there (See St. pg. 230).

The Deputy Prosecutor's statement to the jury about the judge and not the police determining Miller's fate came during the state's rebuttal argument and was solely with reference to the events occuring on April 12 before the Juvenile Court judge when Miller was first placed in juvenile detention after his arrest (St. pgs. 247 and 248). This was entirely accurate, and further, the Deputy Prosecutor correctly advised the jury that Miller was still in juvenile detention when Police Officer Von Allmen interviewed him and took the first statement from him.

Respondent submits that Miller's testimony and the Deputy Prosecutor's argument in this area were entirely accurate and correct, and the jury was in no way misled.

6. **The Peyton Affidavit**

This question, and the contentions with refer-

ence to the same, have been dealt with and covered above, and it has been pointed out that the District Court judge at the evidentiary hearing specifically made this affidavit a part of the record of said evidentiary hearing (See Tr. of March 6, 1970, at pg. 14). Also, as above pointed out this affidavit is in no way inconsistent with the order entered, but actually corroborates, explains and bears it out.

7. **Miller's Fifth Statement**

Nothing further need be said regarding this statement, or its contents, or the circumstances under which it was taken, since this is fully set forth and explained in the above statement of the case, as well as being dealt with in depth by the Ninth Circuit Court Opinion (See petitioner's Appendix A, pg. A-9).

(a) LEGAL ARGUMENT RELATIVE TO DUE PROCESS ISSUE

The Ninth Circuit Court Opinion (petitioner's Appendix A), as amended by an order filed in that Court on April 14, 1971, denying the Petition for Rehearing, stated:

> We reverse because we believe that the ruling of the district court poses a standard of state prosecutorial conduct which is unrealistic.,

citing *Lessard v. Dickson*, 394 F.2d 88 (9th Cir. 1968) and *Lee v. United States*, 388 F.2d 737 (9th Cir. 1968). In its Opinion, the Ninth Circuit Court discussed at length the effect of *Giles v. Maryland*,

386 U.S. 66, 17 L.Ed.2d 737, 87 S.Ct. 793 (1967), and distinguished that case from this case under consideration, saying as follows (see petitioner's Appendix A, pg. A-15):

> As we view *Giles*, the result was based in part upon prosecutorial knowledge of the reports involved there combined with complete frustration of defense efforts to obtain the information. Here, the district court explicitly found that the prosecutor was unaware of the police and juvenile reports and the record clearly shows a total lack of effort by the defense to secure these reports despite the fact that the defense was well aware of Miller's involvement with the police and juvenile authorities.

On the same page, the Ninth Circuit Court further observed that *Giles* specifically declined to decide "whether the prosecution's constitutional duty to disclose extends to all evidence admissible and useful to the defense, and the degree of prejudice which must be shown to make necessary a new trial."

In short, said the Ninth Circuit Court Opinion (Petitioner's Appendix A, pg. A-16) "this is not a case like *Giles* where the defense theory (consent), if believed would have resulted in an acquittal. Rather this information would have been helpful only to the extent that it impeached the testimony of Miller and further questioned his credibility. The credibility of Miller was already so substantially in question that we cannot believe that this additional

information would have altered the result." (the Court's footnote No. 28 in connection with this, appears in petitioner's Appendix A, on page A-19, and is set forth verbatim above).

The Ninth Circuit Court, in its Opinion, also examined and distinguished from this case those cases dealing with this question decided prior to *Giles* (see petitioner's Appendix A-11 and footnote at A-18). Respondent, at this point, makes brief reference to those cases to point up how clearly the same are distinguished from this case.

For instance, in *Mooney v. Holohan*, 294 U.S. 103, 79 L.Ed. 791, 55 S.Ct. 340 (1935), the contention was with reference to the knowing use of perjured testimony by the prosecuting attorney and the deliberate suppression of evidence which would have refuted the testimony given against the defendant. Likewise, also distinguished from our case, is *Alcorta v. Texas*, 355 U.S. 28, 2 L.Ed.2d 9, 78 S.Ct. 103 (1957), which reasserted the *Holohan* ruling, in a situation where the state allowed testimony to stand knowing the same to be false. In *Napue v. Illinois*, 360 U.S. 264, 3 L.Ed.2d 1217, 79 S.Ct. 1173 (1959), the state attorney, although not soliciting false evidence, allowed it to go uncorrected when it appeared. This was where the witness testified that no promise had been made to him of consideration in return for his testimony, whereas actually such a promise had been made to the witness by the state attorney. This is an entirely different situation from

the one obtaining in our case. Also clearly distinguishable is *Miller* v. *Pate*, 386 U.S. 1, 17 L.Ed.2d 690, 87 S.Ct. 785 (1967), where the prosecutor knew at the time of the trial that it was paint, instead of blood, on the shorts of the victim, and the prosecutor allowed the conviction to be obtained by the knowing use of this false evidence. Finally, *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963), involved an actual suppression by the prosecuting attorney of evidence favorable to the accused (the confession of the co-defendant that he actually committed the homicide), even though this evidence had been requested by defendant's counsel prior to trial. Once again, this is clearly a different situation from the one in our case.

For the above reasons, respondent respectfully submits that the Ninth Circuit Court was entirely correct and should be affirmed in its holding on this due process issue.

B. THE EQUAL PROTECTION ISSUE

Pursuant to the remand directions of the Ninth Circuit Court in *Rhinehart v. Rhay*, 409 F.2d 208 (1969), the District Court did hold such an evidentiary hearing in Seattle, Washington, on November 5, 6 and 7, 1969, at which hearing the District Court judge dealt with the equal protection issue pursuant to said remand directions.

Petitioner's principal contention in this area is

that he was denied equal protection because he was singled out for prosecution under the Washington State Sodomy Statute (RCW 9.79.100, see petitioner's Appendix D, pgs. A-26 to A-27). Petitioner also contends that in arresting petitioner the police were motivated by reasons other than the violation of the Sodomy Statute.

The District Court, at the evidentiary hearing, rejected these contentions of petitioner and held that the petitioner was not denied equal protection of the laws, and with this holding the Ninth Circuit Court agreed and affirmed (see petitioner's Appendix A, pgs. A-16 to A-17).

Contrary to petitioner's assertion in his brief before this court (pgs. 41 and 42) that the District Court refused to permit him to put on evidence on his equal protection contention, the District Court, during the three day hearing in November, 1969, heard several of the witnesses called by petitioner on this equal protection issue, considered 105 files of the King County Prosecuting Attorney involving prosecutions of sodomy in the City of Seattle immediately prior to the prosecution of petitioner, and received and heard an extensive offer of proof in open court on the equal protection aspect of this case presented by petitioner's counsel (see pgs. 390 to 405, Rep. Tr., Vol. 3).

In finding that petitioner had not established that his constitutional rights were violated with re-

spect to his claim of denial of equal protection of the laws, and concluding that petitioner's application for a writ of habeas corpus on that ground should be denied, the District Court considered this issue in depth and and made an extensive oral ruling on the same at the time of the evidentiary hearing (see Rep. Tr., Vol. 3, pgs. 374 and 375, and pgs. 405 to 409). In that Opinion, the District Court found that the offer of proof, even if established, would not constitute a constitutional deprivation of equal protection within the cognizance of the federal court, the court noted that there had been 105 prosecutions of sodomy in the City of Seattle immediately prior to the prosecution of the petitioner, and that there had been prosecutions of some 58 or more people who were accused of engaging in illicit sexual activity with young people. Under these circumstances, the District Court distinguished our case from *Yick Wo v. Hopkins*, 118 U.S. 356, 30 L.Ed. 220, 6 S.Ct. 1064 (1886), and stated that this was not a *Yick Wo v. Hopkins* situation at all. With this conclusion, the Ninth Circuit Court completely agreed (see petitioner's Appendix A, pgs. A-16 and A-17). Respondent submits that these rulings are correct and proper and should be sustained.

Respondent also would submit that the *McLaughlin* case relied upon by the petitioner (see petitioner's brief pg. 39) is not in point nor controlling of the situation existing in our case (*McLaughlin vs Florida*, 397 U.S. 184, 13 L.Ed.2d 222,

85 S.Ct. 283, 1964). In the *McLaughlin* case, this court struck down the offending Flordia statute as showing an invidious discrimination on its face since it singled out promiscuous interracial couples for special statutory treatment. This is not the situation in the *Rhinehart* case.

C. THE CONSTITUTIONALLY PROTECTED ZONES OF PRIVACY ISSUE

This issue is raised in petitioner's Question D, commencing on page 42 of petitioner's brief. In support of his argument in this area, petitioner relies primarily on the case of *Griswold v. Connecticut*, 381 U.S. 479, 14 L.Ed.2d 510, 85 S.Ct. 1678 (1965).

Respondent respectfully submits that *Griswold* is not applicable to the present situation. *Griswold* dealt with the marriage relationship and the rights of privacy inherent therein and "nothing in the present case resembles a right of privacy in marriage." (see *Smayda v. United States*, 352 F.2d 251 (CA 9th, 1965)).

Petitioner's contention that the Washington sodomy statute is invalid because the same might be applied against parties to a marriage is without merit since petitioner does not have standing to raise the constitutional rights of married people who may engage in conduct prohibited by the said sodomy statute, RCW 9.79.100. Here there is no "case or controversy" involving the rights of married persons and petitioner does not have an interest therein

nor is he affected thereby, in other words, this case as far as married persons are concerned presents no justiciable controversy. This also was recognized in the case cited by petitioner, *Buchanan v. Batchelor* 308 F. Supp. 729 (1970), where that court specifically questioned the standing of plaintiff *Buchanan* to raise the constitutional rights of married persons committing acts of sodomy. However, with reference to the authority ascribed to *Buchanan* by the petitioner, it would seem that Buchanan has no precedential value at this point since the appeal of that case to this court has been vacated and remanded to the United States District Court for the Northern District of Texas for reconsideration in light of *Younger v. Harris, supra,* and *Samuels v. Mackell* and *Fernandez v. Mackell, supra,* (Journal of Proceedings of the United States Supreme Court, March 29, 1971, Docket Nos. 289 and 290, 8 Cr. L. 4196). Hence the issue concerning the constitutionality of the sodomy statute of the State of Texas is not before this court in the said cases of *Wade v. Buchanan,* Docket No. 289, and *Buchanan v. Wade,* Docket No. 290.

Respondent also submits that petitioner's "police power" argument with respect to the statute in question also is without merit. Here the Washington State Legislature determined in its discretion that the mores of the community and the public morals and interest required the protection afforded by the act in question, RCW 9.79.100, whether consented

to or not. This was within the province of the legislature alone, and a state of facts and the public interest existed which justified the legislation. It has long been recognized that:

> In the exercise of police power, the legislature is vested with a wide discretion not only to determine what the public interest requires, but also to adopt measures necessary for such protection.

(McDermott v. State, 197 Wash. 79, 84 P.2d 372 (1938), pg. 83). This right of a state to so regulate such matters was recognized by this court in the *Griswold* case itself where Mr. Justice Goldberg, in his concurring opinion, appearing on pages 489 and 499 of that decision stated:

> Finally, it should be said of the Court's holding today that it in no way interferes with a state's proper regulation of sexual promiscuity or misconduct. As my Brother Harlan so well stated in his dissenting opinion in *Poe v. Ullman*, *supra*, 367 US at 553, 6 L.Ed.2d at 1025.
>
> > 'Adultery, homosexuality and the like are sexual intimacies which the State forbids . . . but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow but which always and in every age it has fostered and protected.'

This court went on to indicate in *Griswold*, that Connecticut encountered its trouble when, having acknowledged the institution of marriage and the

intimacies therein, it undertook to regulate the details of that intimacy by means of criminal law. The clear distinction between that situation and the one now before this court is at once apparent. Clearly, as pointed out by this Court, the enactment of criminal laws relating to sexual misconduct, including the crime of sodomy, comes well within the police power of the state of Washington.

D. THE VAGUENESS QUESTION

This issue is raised by petitioner's Question E, commencing on page 48 of his brief. Respondent submits that petitioner's argument under this question is not valid and his contention is without merit.

What the court has required is that men of common intelligence must have adequate warning and notice of what the statute describes as a prohibited act. RCW 9.79.100 specifies the acts necessary for the crime in its statutory body and is not indefinite and void under the vagueness doctrine. The petitioner had adequate warning under the statutory language embraced in the act in question. The statute gives fair notice of what acts will be punished, and it specifically delineates ascertainable standards of guilt, so that men of reasonable understanding are not required to guess at the meaning of the staute. See *Winters v. New York*, 333 U.S. 507, 92 L.Ed. 840, 68 S.Ct. 665 (1948).

E. THE FREEDOM OF RELIGION ISSUE

This issue is raised under petitioner's Question F, commencing on page 50 of his brief.

The main thrust of petitioner's argument seems to be his contention that RCW 9.79.100 is based upon proscriptions contained in early religions, and therefore the statute represents an unconstitutional legislative establishment of religion, and the State has failed to show a proper secular legislative purpose for the statute. Respondent submits this argument is not valid and the contention is without merit.

Petitioner relies upon the case of *McGowan v. Maryland*, 366 U.S. 420, 6 L.Ed.2d 393, 81 S.Ct. 1101 (1961). However, that case specifically recognizes that the scope of religious freedom is in fact limited by the principle that the practice of religion may be made to conform to generally prevailing conceptions of the general safety, morals, and welfare of the community, even though those conceptions may have been determined in part by the tenets of some other religion. See *McGowan v. Maryland* at page 442 where this language appears:

> However, it is equally true that the "Establishment" Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation. Thus, for temporal purposes, murder is illegal. And the fact that this agrees with the dictates of the Judaeo-Christian religions while it may disagree with others does

not invalidate the regulations. So too with the questions of adultery and polygamy. *Davis v Beason*, 133 US 333, 33 L ed 637, 10 S Ct. 299; *Reynolds v. United States*, 98 US 145, 25 L ed 244, *supra*. The same could be said of theft, fraud, etc., because those offenses were also proscribed in the Decalogue.

The cited case of *Reynolds v. United States*, 98 U.S. 145, 25 L.Ed 244 (1878), dealt with the question of polygamy and held a statute prohibiting that practice constitutional even though it applied to a member of the Morman faith. On page 166 of that opinion the following appears:

> Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.

Likewise, in the cited case of *Davis v. Beason*, 133 US 333, 33 L.Ed. 637, 10 S. Ct. 299 (1890), this principle was again reiterated on page 345 of the Opinion:

> Whilst legislation for the establishment of a religion is forbidden, and its free exercise permitted, it does not follow that everthing which may be so called can be tolerated. Crime is not the less odious because sanctioned by what any particular sect may designate as a religion.

This principle was recognized and stated by the Honorable William N. Goodwin, United States District Judge, in his Order dated April 19, 1968, which denied petitioner's application for a writ of habeas corpus (Tr. 18 - 21), as follows:

> The court finds that the First Amendment's guarantees of freedom of religion do not encompass the practice of homosexuality any more than they contemplate the practice of polygamy or the use of narcotics.

Respondent submits therefore, that RCW 9.79-.100, which concerns itself with the sexual crime of sodomy, was constitutionally applied to the petitioner herein.

III

CONCLUSION

For the foregoing reasons, respondent respectfully submits that this Cause should not be reviewed by this Court, and that the petition for writ of certiorari should be denied.

Respectfully submitted,

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